79-475

Supreme Court, U.
FILED
SEP 20 1979
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—

JICARILLA APACHE TRIBE,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents,

and

STATE OF NEW MEXICO,
Amicus Curiae.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 27

APPENDICES

Appendix A

Jicarilla Apache Tribe v. United States of America, et al., Order of Hon. H. Vearle Payne, District Judge 1a

Appendix B

Jicarilla Apache Tribe v. United States of America, et al., Opinion of the Tenth Circuit Court of Appeals 3a

Appendix C

Jicarilla Apache Tribe v. United States of America, et al., Complaint 43a

Appendix D

State of New Mexico ex rel. Reynolds v. United States, et al., Complaint 53a

TABLE OF AUTHORITIES

CASES: Page

Arizona v. California, 373 U.S. 546 (1963), *decree*, 376 U.S. 340 (1964), *supplemental decree*, ___ U.S. ___, 99 S. Ct. 995, 58 L.Ed.2d 627 (1979) 22, 26

Bowles v. Willingham, 321 U.S. 503 (1944) 22

Bryan v. Itasca County, 426 U.S. 373 (1976). 12,24,25

Cappaert v. United States, 426 U.S. 128 (1976) 9, 17, 22

Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977) 9, 14

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 9, 10, 13 15, 17, 18, 20, 22, 25, 26

Fisher v. District Court, 424 U.S. 382 (1976) 11

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 19

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 11, 13, 14, 15, 23

McKay v. Kalyton, 204 U.S. 458 (1907) 23

Minnesota v. United States, 305 U.S. 382 (1939) 15, 16, 17, 21, 22

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 25

Morton v. Mancari, 417 U.S. 535 (1974) 16, 22

Northern Cheyenne Tribe v. Adsit and United States v. Tongue River Water Users Association, Civil No. 75-20 Blg. in United States District Court for the District of Montana ... 18

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 23

Page

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 13, 14

Rice v. Olson, 324 U.S. 786 (1945) 23

State of New Mexico ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976) 9

State of New Mexico ex rel. Reynolds v. United States et al., No. 75-184, District Court for San Juan County, New Mexico 7, 8, 26

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 16

United States v. Chavez, 290 U.S. 357 (1933) 11

United States v. Kagama, 118 US. 375 (1886) 23

United States v. Nevada, 412 U.S. 534 (1973) 22

United States v. New Mexico, 438 U.S. 696 (1978) 24

United States v. Rickert, 188 U.S. 432 (1903) 12

United States v. Sandoval, 231 U.S. 28 (1913). ... 12

United States v. Sutton, 215 U.S. 291 (1909). 12

Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965). 11

Washington v. Washington State Commercial Passenger Fishing. Vessel Assn., ___ U.S. ___, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) ... 24

Washington v. Yakima Indian Nation, ___ U.S. ___, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) .. 12, 13

Williams v. Lee, 358 U.S. 217 (1959). 11, 24

Williams v. United States, 327 U.S. 711 (1946) 11

Wilson v. Omaha Indian Tribe, ___ U.S. ___, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979) 24

Page

Yoder v. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, 339 F.2d 360 (9th Cir. 1964) 20

STATUTES:

18 Stat. 474 10
25 Stat. 676 23
36 Stat. 557 (New Mexico Enabling Act) 3, 9, 11, 14
67 Stat. 586 14
67 Stat. 588 (Public Law 83-280) 12, 13, 14, 15, 24
72 Stat. 339 23
25 U.S.C. §345 23
25 U.S.C. §357 16
25 U.S.C. §1322(b) 15
25 U.S.C. §1324 15
28 U.S.C. §1254(1) 2
28 U.S.C. §1345 10
28 U.S.C. §1362 ..... 2, 4, 6, 10, 20, 21, 22, 23, 25
43 U.S.C. §§615pp *et seq.* 6
43 U.S.C. §666 (McCarran Amendment) 5, 6, 7, 9, 14, 15 16, 17, 20, 24, 25, 26

NEW MEXICO CONSTITUTION AND STATUTES:

New Mexico Constitution, Article XXI, Preamble and Sections 2 and 10 ..... 2, 3, 9, 14
Section 72-4-17 N.M.S.A. (1978 Comp.) previously Section 75-4-6 N.M.S.A. (1953 Comp) 8

Page

LEGISLATIVE HISTORY:

S. Rept. No. 669, 83d Cong., 1st Sess. (1953) 13
H.R. Rept. No. 2040, 89th Cong., 2d Sess. (1966) . 21
S. Rept. No. 1507, 89th Cong., 2d Sess. (1966). ... 21
99 Cong. Rec. 10782 (1953) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Jicarilla Apache Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 22, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The order of the District Court for the District of New Mexico is not reported. They are both reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was issued on June 22, 1979. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions in the New Mexico Enabling Act and the New Mexico Constitution in which the people of New Mexico agree and declare that lands held or owned by Indian tribes shall be and remain under the absolute jurisdiction and control of the Congress of the United States preclude the adjudication of the water rights of the Jicarilla Apache Tribe in New Mexico state courts.

2. Whether Indian water rights should be adjudicated in federal court if the federal court's jurisdiction has been invoked in a timely fashion by the United States or an Indian tribe.

3. Whether a water rights adjudication suit initiated by an Indian tribe in federal court pursuant to 28 U.S.C. § 1362 can or should be dismissed in favor of a pending state court adjudication.

4. Whether the lower courts erred by dismissing an action to adjudicate the water rights of an Indian tribe and the United States in favor of a pending state court without addressing any of the relevant factors.

STATUTES INVOLVED

1. Section 2 of the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, 558-560, provides in pertinent part:

> And said [constitutional] convention [for the Territory of New Mexico] shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State-- . . .
>
> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . .
>
> All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress.

2. The Preamble, Section 2 and Section 10 of Article XXI New Mexico Constitution provide in pertinent part:

> **Preamble**
>
> In compliance with the requirements of the act of congress, entitled, "An act to enable the people

of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states; and to enable the people of Arizona to form a constitution and state government and be admitted into the union on an equal footing with the original states," approved June twentieth, nineteen hundred and ten, it is hereby provided: . . .

Section 2.

The people inhabiting this state do agree and do declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; . . .

Section 10.

This ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.

3. United States Code, Title 28:

Section 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

4. United States Code, Title 43:

Section 666. Suits for adjudication of water rights--Joinder of United States as defendant; costs

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necesary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subjected to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated respresentative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

STATEMENT OF THE CASE

Invoking the federal district court's jurisdiction pursuant to 28 U.S.C. § 1362, the Jicarilla Apache Tribe filed a water rights suit involving the waters of the Navajo River and its tributaries in the State of New Mexico in December, 1975. The United States, the Secretary of the Interior, and several private parties were named as defendants.[1] The Tribe sought two forms of relief, a quiet title adjudication of the relative rights of all water users (including the Tribe) on the Navajo River and an injunction against alleged illegal diversions of the Navajo River undertaken by the Secretary of the Interior pursuant to the San Juan-Chama Reclamation Project, 43 U.S.C. §§ 615pp *et seq.* App. at 43a.

The Tribe's complaint alleged that the United States claims rights to the use of the Navajo River in its proprietary capacity as the owner of public lands, public water holes and springs, and national forests, and to carry out the San Juan-Chama Reclamation Project. The United States was named as a defendant in the Tribe's quiet title action pursuant to the McCarran Amendment, 43 U.S.C. § 666, which gives the consent of the United States to its joinder as a defendant in suits for the adjudication of rights to the use of water of a river system or other source. The answer of the United States conceded the district court's jurisdiction.

Several months prior to the initiation of the Tribe's action, the State of New Mexico filed a suit to adju-

[1] The Tribe's claims against the named defendants who appeared other than the United States and the Secretary of the Interior were subsequently settled.

dicate rights to the use of the waters of the San Juan River and its tributaries, which include the Navajo River, in the District Court of the State of New Mexico for San Juan County in *State of New Mexico ex rel. Reynolds* v. *United States, et al.*, No. 75-184, hereafter referred to as "*Reynolds.*"[2] The United States was also joined as a defendant in that suit pursuant to the McCarran Amendment. New Mexico's complaint alleged:

> that the United States of America is known to claim various and substantial rights to impound and/or divert and use public waters of the San Juan River Stream System on its own behalf and on behalf of its wards, to wit, the Jicarilla Apache Tribe of Indians, the Navajo Tribe of Indians and the Ute Mountain Tribe of Indians, under the Constitution and laws of the United States as well as under the Constitution and laws of the State of New Mexico . . .

App. at 54a.

and sought an adjudication of those rights. New Mexico's complaint also alleged:

> that all known claims to the right to the use of waters of the said stream system in New Mexico were adjudicated in the final decree of the District Court in and for San Juan County, New Mexico in Cause No. 01690, *The Echo Ditch Co., et al.*, v. *The McDermott Ditch Co., et al.*, with the exception of the claims of the United States of America on its own behalf and on behalf of its wards, which claims have never been determined and decreed by any court.

App. at 54a.

The United States filed an answer to New Mexico's complaint alleging, *inter alia*, that the state court "is

[2] New Mexico's Complaint is reproduced in the Appendix.

without jurisdiction of this action insofar as it relates to the water rights of the three Indian tribes for whom the United States is Trustee." Efforts by the United States and the three tribes to dismiss this action or to remove it to federal court were not successful. App. at 4a-5a. At this writing there have not been any proceedings in the state court suit other than hearings on these motions to intervene and to dismiss and the removal petition. There has not been any discovery and the court has not entered any pretrial orders.

In the Tribe's federal court action, the State of New Mexico, which is not a party, filed a suggestion of want of federal court jurisdiction and supporting brief as *amicus curiae.* New Mexico argued that the Tribe's federal suit should be dismissed in favor of the *Reynolds* suit then pending in the state court. In July 1977, the federal district court entered an order dismissing the suit for lack of jurisdiction on the ground that a New Mexico law, now codified as Section 72-4-17, N.M.S.A. (1978 Comp.), vested the state courts with exclusive jurisdiction over the controversy.

On appeal to the Tenth Circuit, the Tribe and the United States argued that the Tribe's federal court suit should not have been dismissed and that New Mexico's state courts do not have jurisdiction to adjudicate Indian water rights. The State of New Mexico filed a brief and argued orally as *amicus curiae* urging affirmance of the order dismissing the Tribe's suit.

The Court of Appeals affirmed in part and reversed in part. It upheld the district court's dismissal of the Tribe's complaint insofar as it sought to quiet the title of all water users in and to the Navajo River but

reversed the dismissal of the injunctive suit against the Secretary of the Interior. The court held that the Indian disclaimer provisions in New Mexico's Enabling Act and Constitution do not preclude the adjudication of Indian water rights in New Mexico's courts because the disclaimer is limited to matters of a proprietary, as opposed to governmental, nature. App. at 40a-41a.[3] The Tribe seeks review of the dismissal of its quiet title action.

REASONS FOR GRANTING THE WRIT

"It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 804 (1976), hereafter referred to as "*Colorado River.*" In *Colorado River,* the Court unanimously held that the McCarran Amendment, 43 U.S.C. § 666, did not divest the federal courts of jurisdiction to adjudicate federal and Indian water rights,[4] but that it did authorize the adjudication of the water rights of two Indian reservations in Colorado in the courts of that state. In resolving the resulting choice of forum question, the six-justice majority held that the federal district court properly dismissed a water rights suit filed by the United States in favor of a Colorado state court proceeding in the particular circumstances of that case. Justices Stewart, Blackmun and Stevens dissented from the dismissal of the federal suit on the grounds, *inter alia,* that issues of federal law should

[3] The New Mexico Supreme Court reached the same conclusion in State of New Mexico ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976). *But see* Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977).

[4] *See also* Cappaert v. United States, 426 U.S. 128, 145 (1976).

be decided by the federal courts and that "a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians." 424 U.S. at 862.

This case, like *Colorado River*, presents the question whether Indian water rights will be adjudicated in federal or state courts. There are three important features that distinguish this case. First, the New Mexico Enabling Act and Constitution, unlike Colorado's, contain express prohibitions on the exercise of state jurisdiction over Indian lands.[5] Second, in this case the federal court suit was initiated by a federally recognized Indian tribe pursuant to 28 U.S.C. § 1362 while *Colorado River* involved an action brought by the United States under 28 U.S.C. § 1345. *Colorado River* specifically left open the question of "whether similar considerations would permit dismissal of a water suit brought by a private party in federal district court." 424 U.S. at 820 n.26. *See also* 424 U.S. at 827 (Stevens, J. dissenting). Third, in this case all of the private water rights on the stream system had previously been adjudicated. The only objective of the state initiated state court suit was to adjudicate the water rights of the United States and its Indian wards.

The issues presented in this suit are of a recurring nature. Their resolution at this time will result in the more efficient and expeditious handling of many complex suits that are now pending or can reasonably be expected in the federal and state court systems. Moreover, the *Colorado River* decision has produced mis-

[5] The only mention of Indians in Colorado's Enabling Act or Constitution is the provision in the Enabling Act, 18 Stat. 474, that states: "The Constitution shall be republican in form and make no distinction in political rights on account of race or color, except Indians not taxed. . . .

chievous consequences that probably were not anticipated. For this reason too, it should not be extended to the different circumstances presented here.

1. New Mexico's Enabling Act and Constitution provide that Indian lands "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." This disclaimer was expressly made "irrevocable without the consent of the United States and the people of said State." *Supra* at 3.

This Court has long looked to and relied on the Indian jurisdictional disclaimers in the enabling acts and constitutions of New Mexico and other western states in holding that states lack governmental jurisdiction over Indians and Indian lands. *Fisher* v. *District Court*, 424 U.S. 382, 386 and n.8 (1976) (tribal court had exclusive jurisdiction over an Indian adoption proceeding arising on the reservation); *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 175-176, n.15 and 177-178 (1973) (state lacked power to tax the income of Indians who live and work on the reservation); *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965) (state lacked power to levy a sales tax on transactions between a licensed reservation trader and reservation Indians); *Williams* v. *Lee*, 358 U.S. 217, 222-223 and n.10 (1959) (state court lacked jurisdiction of a civil suit against reservation Indians for goods sold to them by a non-Indian business on the reservation); *Williams* v. *United States*, 327 U.S. 711, 714-715 n.10 (1946) (state lacked criminal jurisdiction over offense committed by a non-Indian against an Indian); *United States* v. *Chavez*, 290 U.S. 357, 360 and 365 (1933) (state lacked criminal jurisdiction over non-Indian charged with

larceny within Indian reservations); *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913) (state lacked power to prosecute non-Indian for introducing intoxicating liquor into Indian country); *United States* v. *Sutton*, 215 U.S. 291, 295 (1909) (state lacked power to prosecute non-Indians for introducing intoxicating liquor into Indian country); and *United States* v. *Rickert*, 188 U.S. 432, 440-441 (1903) (state lacked power to tax allotted Indian lands).

Congress has also recognized that the Indian jurisdictional disclaimers in state enabling acts and constitutions preclude the states from exercising governmental jurisdiction over Indian reservations. The Act of August 15, 1953, Public Law 83-280, 67 Stat. 588, authorized five named non-disclaimer states to exercise limited jurisdiction over civil causes of action and criminal offenses in Indian country except for three named reservations. Sections 2 and 4.[6] It gave the remaining states an option to assume jurisdiction over criminal offenses and civil causes of action. States whose constitutions or statutes contained organic law disclaimers of jurisdiction were dealt with in Section 6; all others were covered by Section 7. *See Washington* v. *Yakima Indian Nation*, ___ U.S. ___, ___, 99 S.Ct. 740, 746-748, 58 L.Ed.2d 740, 750-752 (1979). Section 6, which is quoted in the margin,[7] recognizes that the assumption of civil and crim-

[6] The scope of jurisdiction conferred by the Act is the subject of Bryan v. Itasca County, 426 U.S. 373 (1976).

[7] SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That

inal jurisdiction by disclaimer states requires three measures: (1) repeal by the United States of the Indian disclaimers in state enabling acts; (2) consent of the United States to the amendment of the disclaimers in state constitutions or statutes; and (3) the actual amendment of their constitutions or statutes by the people of the states.[8] Otherwise, the disclaimers would stand as "legal impediment[s]" to the assumption of the civil and criminal jurisdiction conferred by Public Law 83-280. *See also* S. Rept. No. 669, 83d Cong., 1st Sess. 6 (1953); 99 Cong. Rec. 10782 (1953).[9]

If, as held by the Court of Appeals (App. B), the disclaimers are limited to matters of a proprietary nature, Section 6 of Public Law 83-280 would be meaningless and *Washington* v. *Yakima Indian Nation*, *supra*, would not have been necessary. The lower court's reliance on *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962) (App. at 36a-37a), is misplaced. As explained in *McClanahan* v. *Arizona Tax Commission*, *supra*:

> In Egan, we held that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction,"

the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

[8] Washington v. Yakima Indian Nation, *supra*, holds that Public Law 83-280 does not impose on disclaimer states the obligation for the People to amend their state constitutions and that the question of whether action by the state legislature is sufficient to assume jurisdiction over Indian country presents a question of state law.

[9] Significantly, in conferring limited civil jurisdiction, Section 4 of Public Law 83-280, 28 U.S.C. § 1360(b), explicitly excludes the adjudication of Indian property rights, including water rights, in state courts. *See Colorado River*, *supra*, 424 U.S. at 812 n.20; and n.12, *infra*.

> and that this language in federal legislation [i.e. the Indian disclaimer provisions in state enabling acts] did not preclude the exercise of residual state authority. [citation omitted]. But that holding came in the context of a decision concerning the fishing rights of *nonreservation* Indians. [citation omitted]. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indans.

411 U.S. at 176 n.15, emphasis in original. The lower court ignored *McClanahan's* relegation of *Kake* to nonreservation situations. Its efforts to distinguish *McClanahan* (App. at 38a-39a) are clearly unavailing.[10]

In holding that the Indian jurisdictional disclaimers are limited to matters of a proprietary nature, the decision below conflicts with numerous decisions of this Court and is also incompatible with Congress' treatment of the disclaimers in Public Law 83-280.

2. So far as the issues in this case are concerned, the disclaimers in New Mexico's Enabling Act and Constitution have not been revoked or amended by the United States or by the people, or the legislature, of New Mexico.[11] The McCarran Amendment does not

[10] In Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977), the New Mexico Supreme Court expressly recognized that *McClanahan* had "narrowed" *Kake* v. *Egan* to non-reservation situations.

[11] We know of three instances when Congress expressly repealed the disclaimers in New Mexico's Enabling Act and/or gave its consent to the Amendment of New Mexico's Constitution. Section 3 of the Act of August 15, 1953, 67 Stat. 586, gives the consent of the United States to the repeal of the provision of New Mexico's Constitution relating to the sales of intoxicants to Indians. Pursuant to this authorization, the people of New

mention "Indians," "Indian water rights," or "state courts." On its face, it is purely and simply a waiver of the sovereign immunity of the United States in water adjudication suits. Unlike Public Law 83-280, it does not purport to confer subject matter jurisdiction on state courts nor does it repeal, modify or even mention the disclaimer provisions.

Colorado River held that Indian water rights are included in the McCarran Amendment's waiver of the sovereign immunity of the United States.[12] But in

Mexico amended Section 1 of Article XXI of their Constitution at a special election held September 15, 1953. Section 6 of Public Law 83-280, quoted *supra* at n.7, and Section 404 of the Act of April 11, 1968, 25 U.S.C. § 1324, are identical. New Mexico has never accepted the jurisdiction offered by the latter two laws and, in any event, they expressly exclude the adjudication of Indian water rights in state courts. *See* note 9, supra; and 25 U.S.C. § 1322(b).

[12] On the authority of Minnesota v. United States, *infra*, the McCarran Amendment's waiver of sovereign immunity should be limited to suits in federal courts. *See infra* at 16-17. It should also be noted that Public Law 83-280 was enacted only eleven months after the McCarran Amendment and, as pointed out *supra* at n. 9, it includes a provision that specifically prohibits the adjudication of Indian water rights in state courts. This provision is inexplicable unless Congress assumed that state courts lacked jurisdiction over Indian water rights even after the enactment of the McCarran Amendment. *See* McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177 (1973). Public Law 83-280 also shows that Congress recognized that grants of jurisdiction over Indians to state courts must be express. Of course, there is no such explicit grant in the McCarran Amendment.

In *Colorado River*, the Court stated that the McCarran Amendment is more specific than Public Law 83-280 and is therefore controlling. 424 U.S. at 812 n.20. We respectfully submit that this conclusion was erroneous. Public Law 83-280 specifically denies jurisdiction of state courts to adjudicate Indian water rights whereas the McCarran Amendment simply waives sovereign immunity with regard to adjudications of all water rights "owned" by the United States and does not mention either Indians or state courts.

applying the McCarran Amendment in the disclaimer states, effect must also be given to the Indian jurisdictional disclaimers. There is, of course, a "cardinal rule that repeals by implication are not favored." *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). *Morton* v. *Mancari* also teaches that:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable . . .

417 U.S. at 550, and that:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

417 U.S. at 551. In this case, the McCarran Amendment and the Indian jurisdictional disclaimers are not irreconcilable. Effect can be given to both by holding that in the disclaimer states the adjudication of Indian water rights must take place in the federal courts, at least until the disclaimer provisions are repealed, modified or amended.

This position is also strongly supported by *Minnesota* v. *United States*, 305 U.S. 382 (1939). In that case, the Court construed 25 U.S.C. § 357 which subjects allotted Indian lands to condemnation under the laws of the state where located in the same manner as land owned in fee. The Court held that this statute constitutes a waiver of the government's sovereign immunity but that the condemnation suits permitted by the statute must be brought in federal courts be-

cause "the judicial determination of controversies concerning [Indian lands] has been commonly committed exclusively to federal courts." 305 U.S. at 389. This result was reached even though the statute expressly made state substantive law applicable in the condemnation suits. The argument for exclusive jurisdiction in the federal courts is stronger in our case because nothing in the McCarran Amendment subjects Indian water rights to state substantive law. *Colorado River*, 424 U.S. at 813; *Cappaert* v. *United States*, 426 U.S. 128, 145-146 (1976). *Minnesota* shows that the McCarran Amendment's waiver of sovereign immunity can and should be reconciled with the jurisdictional disclaimers by limiting the waiver to suits in the federal courts when Indian rights are being adjudicated.

The Court of Appeals erred by holding, in essence, that the McCarran Amendment repealed the Indian jurisdictional disclaimers by implication (*see* App. at 35a-36a) even though the two statutes are not irreconcilable and are capable of coexistence. In so doing, the rules framed by this Court for applying two statutes that relate to the same subject were ignored.

3. Three years of experience under the *Colorado River* decision have demonstrated that it has led to the filing of much unnecessary as well as duplicative litigation in both the federal and state courts and that it has made the handling of such already complex litigation even more difficult, expensive, and time-consuming.

Colorado River holds that there is concurrent jurisdiction in the federal and state courts to adjudicate Indian water rights in non-disclaimer states and that

the determination of whether an adjudication should proceed in federal or state courts depends in part upon a particularized analysis of the unique facts and circumstances of each case. One such factor is the extent to which a case has progressed in either the federal or state courts. 424 U.S. at 820. Not surprisingly, after *Colorado River* the states and their water users as well as the United States and the Indian tribes have tried to establish footholds in their preferred forums. This has led to the filing of many cases that would not otherwise have been brought and to extensive procedural maneuvering designed to prevent the state or federal court from reaching the merits of the case or even getting the cases ready for trial.[13] *Colorado River* has also added several more years of litigation on the already difficult, expensive, time-consuming and cumbersome water adjudication process by presenting the state and federal courts with the threshold issue of whether to exercise jurisdiction or to defer to the alternative forum. In one case in Montana,[14] for example, a motion to dismiss the federal suit was brought prior to the *Colorado River* decision and is

[13] Subsequent to *Colorado River*, more than twelve lawsuits involving the adjudication of Indian water rights have been initiated in Montana, New Mexico, Arizona, Wyoming and Washington. In most of these situations duplicative litigation is pending in both the federal and state courts and each forum has been, or probably soon will be, requested to dismiss in favor of the other. These five states, as well as Utah, Kansas, Oklahoma, North Dakota, South Dakota, Alaska, and Idaho are subject to Indian jurisdictional disclaimers in their enabling acts or state constitutions. The non-disclaimer western states are Colorado, California, Oregon, Nevada, Nebraska and Texas.

[14] Northern Cheyenne Tribe v. Adsit and United States v. Tongue River Water Users Association, Civil No. 75-20 Blg. in the United States District Court for the District of Montana.

still pending more than three years later. If the federal court suit is dismissed, a two or three year appeal process seems inevitable.

None of the Indian water rights cases pending in the courts of the disclaimer states has yet gone to trial. From the standpoint of promoting economy of judicial resources in this specific case as well as generally throughout the western states, it is propitious for the disclaimer issue to be resolved sooner rather than later.

4. In its current posture, this case is appropriate for Supreme Court review. *See, e.g., Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-154 (1964). There is a justiciable controversy between the Jicarilla Apache Tribe and the United States on the merits. The only rights left to adjudicate are those of the Tribe and the United States. As the Court of Appeals stated, the San Juan diversion claim and the general water rights adjudication "do not arise from a 'common nucleus of operative facts.'" App. at 42a. The diversion claim does not involve the quantification of the Tribe's or the government's water rights. A decision as to the propriety of the diversions would not obviate the need to settle the question, of vital importance to the disclaimer states and the tribes, of the proper forum for adjudication of the Tribe's water rights.

The decision of the Court of Appeals below, that the courts of disclaimer states have jurisdiction to adjudicate Indian water rights, is an important and clearcut ruling which will have a direct bearing on other water rights cases pending in the disclaimer states of New Mexico, Montana, Arizona, Wyoming and Washington. Here, as in *Gillespie, supra*, "the

eventual costs . . . will certainly be less if [this Court] now pass[es] on the questions presented here rather than send the case back [to the federal and state court] with those issues undecided." 379 U.S. at 153. There is also "ample reason to view [the Tribe's claims for quiet title and injunctive relief] as severable. . . ." and there is no doubt that the lower courts' jurisdictional "ruling was fundamental to the further conduct of the case." *Id.* For all of these reasons, this case warrants review at this time.

5. This case, unlike *Colorado River,* was brought in federal court by an Indian Tribe pursuant to 28 U.S.C. § 1362. The McCarran Amendment applies only to the United States, not to Indian tribes. Therefore, the considerations that led to dismissal of the government's suit in *Colorado River* are not present in this suit which was initiated by the Tribe. Section 1362 and its underlying policies must govern this choice of forum question. As noted *supra* at 10, this issue was expressly left open in *Colorado River.* 424 U.S. at 820 n.26.

28 U.S.C. § 1362, enacted in 1966, provides for federal question jurisdiction in the federal district courts over civil actions brought by Indian tribes, without regard to the amount in controversy. Its legislative history demonstrates that it was prompted by *Yoder* v. *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation,* 339 F.2d 360 (9th Cir. 1964), which held that Indian tribes could not bring property rights litigation in federal court without satisfying the $10,000 amount in controversy criterion. The Reports of the Senate and House Committees cite four crucial factors in support of the bill that was eventually enacted.

First, "traditionally, the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts. *Minnesota* v. *United States,* 305 U.S. 382 (1939)."[15]

Second, "the issues involved in cases involving tribal lands . . . are Federal issues" and "particularly as to this class of cases it is appropriate that the actions be brought in a U.S. district court."[16]

Third, "[t]here is great hesitancy on the part of the tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated."[17]

Fourth, "[f]ederal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years."[18]

The legislative history of Section 1362 conclusively shows that Congress intended for cases of this kind to be heard in the federal courts. Congress was aware of *Minnesota* v. *United States, supra,* and approved of its holding that federal courts have exclusive jurisdiction over controversies involving Indian property rights. The Indians' "traditional fear" of state courts was recognized and respected and federal courts were deemed to be more qualified to interpret and apply

[15] H.R. Rept. No. 2040, 89th Cong., 2d Sess. 2 (1966).

[16] *Id.*

[17] S. Rept. No. 1507, 89th Cong., 2d Sess. 2 (1966).

[18] *Id.*

the relevant body of federal law that has developed over the years. Since Section 1362 jurisdiction was not involved in *Colorado River*, the Court's opinion did not mention Section 1362, its legislative history, or its underlying policies.

Considered in light of its legislative history, the federal court jurisdiction conferred by Section 1362 should be deemed exclusive. *Minnesota* v. *United States*, *supra*. *Cf.*, *Bowles* v. *Willingham*, 321 U.S. 503, 511-512 (1944). Assuming *arguendo* that Section 1362 jurisdiction is not exclusive, effect should be given to both the McCarran Amendment and Section 1362 by adjudicating the water rights of the Jicarilla Apache Tribe in federal court. *Morton* v. *Mancari*, *supra*.

6. In *Colorado River*, the Court suggested that Indian water rights were not endangered by their adjudication in state courts because their determination presents federal questions that can be reviewed by the Supreme Court. 424 U.S. at 813. The Tribe respectfully disagrees.

The quantification of Indian water rights hinges on critical factual determinations involving such matters as the amount of "practicably irrigable" acreage within a reservation, the amount of water required to irrigate that acreage, and the amount of water needed to maintain and preserve fisheries and other reservation resources. *See, e.g., Arizona* v. *California*, 373 U.S. 546, 600 (1963); *United States* v. *Nevada*, 412 U.S. 534, 536 (1973); and *Cappaert* v. *United States*, *supra*, 426 U.S. at 141. These matters of "life-and-death importance to Indians," *Colorado River*, 424 U.S. at 862 (Stewart, J. dissenting), should not be

entrusted to state courts. While the Supreme Court may review and correct erroneous legal determinations, it is difficult, if not impossible, to overcome the effects of a factfinder's partiality.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 168 (1973), quoting *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). Both the Indian jurisdictional disclaimers and 28 U.S.C. § 1362 are manifestations of this policy.[19] As this Court noted almost one hundred years ago, "[b]ecause of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (upholding the exclusive jurisdiction of federal courts over certain crimes committed by Indians on a reservation).[20] That this situation has remained virtually unchanged is shown by the inclusion of a disclaimer provision in Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), and by Congress' enactment of 28 U.S.C. § 1362 in 1966. *See supra* at 20-22. The inability of state courts to render fair decisions in Indian property rights disputes is further demonstrated, rather conclusively, by the contemporaneous western Washington fishing rights controversy. *See Washington* v.

[19] *See also* 25 U.S.C. § 345; McKay v. Kalyton, 204 U.S. 458 (1907); and Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 and 678 (1974). We are not aware of any laws that subject Indian property rights that are held in trust or are subject to restrictions against alienation to state court jurisdiction.

[20] The Act providing for the admission of North Dakota, South Dakota, Montana and Washington to the Union, 25 Stat. 676, which includes an Indian disclaimer, 25 Stat. at 667, was enacted in 1889, only three years after the *Kagama* decision.

Washington State Commercial Passenger Fishing Vessel Ass'n., ___ U.S. ___, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). In another recent case, this Court took cognizance of the Indians' and the government's legitimate concerns about the impartiality of state courts in Indian matters.

> The United States fears a hostile and unfavorable treatment at the hands of state law, but as we have said the legal issues are federal *and the federal courts will have jurisdiction to hear them.* Adequate means are thus available to insure fair treatment of tribal and federal interests. [emphasis added, citation omitted].

Wilson v. *Omaha Indian Tribe*, ___ U.S. ___, ___, 99 S.Ct.2529, 61 L.Ed.2d 153, 170 (1979). The negative implication is that fair treatment cannot be insured in state courts.[21]

The policy of leaving Indians free from state jurisdiction and control, embodied in the Indian disclaimers and Section 1362, is no less urgent or necessary today than it was 100 years ago. If this longstanding policy is to be changed, it should be done expressly by Congress. *Bryan* v. *Itasca County*, 426 U.S. 373, 389-390 (1976); *Williams* v. *Lee*, *supra*, 358 U.S. at 223. In enacting the McCarran Amendment in 1952, Congress did not find or declare that Indians could receive fair treatment in the courts of the disclaimer states, and Public Law 83-280 (1953)[22] and 28 U.S.C.

[21] In New Mexico and many other western states, state court judges are directly responsible to the local electorate. The water rights claimed by Indian tribes in the arid west are large and are adverse to practically everyone else. *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 699 and 705 (1978).

[22] *See supra* at nn. 9 and 12.

§ 1362 demonstrate that Congress intended for Indian property rights to be adjudicated in the federal courts. The lower courts erred by failing to recognize or to give effect to this policy.[23]

7. *Colorado River* held that "[i]n assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction . . . [n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. . . . Only the clearest of justifications will warrant dismissal." 424 U.S. at 818-819. In this case, neither the district court nor the Court of Appeals ever addressed any of the relevant factors. The district court held, contrary to *Colorado River*, that state court jurisdiction is exclusive. App. at 2a. The Court of Appeals rejected the contention of the Tribe and the United States that the state court lacked jurisdiction, but never considered "the appropriateness of dismissal."

There is one aspect of this case that makes dismissal of the Tribe's federal suit particularly unjustified. The only purpose of the state court suit

[23] Even assuming *arguendo* that the McCarran Amendment evinced a policy of subjecting Indian property rights to adjudication by state courts, this Court has held that Indian statutes enacted in furtherance of policies that have been discarded must be applied and construed in light of intervening laws that implement different, and to some extent conflicting, policies. Bryan v. Itasca County, 426 U.S. 373, 386-387 and 388 n.14 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 477-479 (1976). In this case, the subsequent enactment of Public Law 83-280 and 28 U.S.C. § 1362 show that current congressional policy calls for the adjudication of Indian property rights in the federal courts.

initiated by the State of New Mexico (*Reynolds, supra*) is to adjudicate the San Juan River system water rights held by the United States on its own behalf and on behalf of the Jicarilla Apache, Ute Mountain and Navajo Indian Tribes. *See supra* at 7. All other water rights have already been adjudicated. *Id.* Therefore the adjudication of water rights has already been fragmented; the policy of the McCarran Amendment to avoid piecemeal adjudications (*Colorado River*, 424 U.S. at 819) is not served by the lower courts' dismissal of the Jicarilla Tribe's action. In this case, as in *Arizona* v. *California, supra*, 373 U.S. at 597-601, *decree* 376 U.S. 340 (1964), *supplemental decree*, ___ U.S. ___, 99 S.Ct. 995, 58 L.Ed.2d 627 (1979), the Indian rights decreed by the federal court can readily be integrated with previously decreed private rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1979

APPENDIX

APPENDIX A

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

CIVIL NO. 75-742P

JICARILLA APACHE TRIBE,

Plaintiff,

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA; DENVER-RIO GRANDE WESTERN RAILWAY CO., MANUELITO GARCIA, ESTEBAN GOMEZ, OLAN CROWLEY, LEOPOLDO MARTINEZ, RAFAEL JARAMILLO, JOSE F. MARTINEZ, JOSE I. GARCIA, CLOTILDA MUNOZ, and all unknown claimants of interest to water in the Navajo River and waters tributary thereto in the State of New Mexico,

Defendants.

ORDER

This matter came to be heard on the Suggestion of Want of Jurisdiction filed herein by the State of New Mexico as Amicus Curiae. The Court takes judicial notice of the pendency of the case of *State of New Mexico, ex rel. S. E. Reynolds, State Engineer* v. *United States of America*, et al. (No. 75-184) in the New Mexico District Court for the County of San Juan, a case brought by the State as a general adjudication of rights to the use of water in New Mexico from the San Juan River and its tributaries, including the Navajo River. The Court further takes judicial notice that the United States of America was joined as a defendant in said adjudication under the authority of the McCarran Amendment, 43 U.S.C. § 666, both in its own behalf and on behalf of the Navajo, Ute Mountain Ute, and Jicarilla Apache Tribes of Indians.

The Court concludes that the New Mexico District Court for the County of San Juan has exclusive jurisdiction to proceed to determine all rights to the use of water in New Mexico from the San Juan stream system, including the claims of the United States on behalf of the Jicarilla Apache Tribe to the waters of the Navajo River. Section 75-4-6, N.M.S.A. (1953 Comp.), states that "[t]he Court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved . . ." This provision is binding on the United States as a defendant in *State of New Mexico, ex rel., S. E. Reynolds, State Engineer* v. *United States of America* (No. 75-184, supra), by virtue of 43 U.S.C. §666, which provides in part that "[t]he United States, when a party to any such [stream adjudication], shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto . . ." In light of the United States Supreme Court's decision in *Colorado River Water Conservation District et al* v. *United States*, 424 U.S. 800 (1976), the effect of N.M.S.A. §75-4-6, made applicable to the United States by 43 U.S.C. §666, is to preclude this Court from the contemporaneous exercise of its concurrent jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint herein be, and hereby is, dismissed for lack of jurisdiction over the subject matter. This Order shall be without prejudice to Plaintiff to assert in the case of *State of New Mexico* v. *United States of America, et al.*, No. 75-184 in the New Mexico District Court for the County of San Juan, any claims it may have raised in the instant complaint.

/s/ H. Vearle Payne

UNITED STATES DISTRICT JUDGE

APPENDIX B

PUBLISH

No. 77-1737

JICARILLA APACHE TRIBE,

Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Appellees,

STATE OF NEW MEXICO, ex rel. S.E. REYNOLDS, State Engineer,

Amicus Curiae.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 75-742-P)

Submitted: March 12, 1979

Lester K. Taylor of Nordhaus, Moses and Dunn, 200 Lomas Boulevard N.W., Albuquerque, New Mexico, for Appellant.

Edward J. Shawaker, Department of Justice, Washington, D.C., (James W. Moorman, Assistant Attorney General; Victor R. Ortega, United States Attorney; Charles N. Estes, Jr., Assistant United States Attorney, Albuquerque, New Mexico; Dirk D. Snel, Department of Justice, Washington, D.C., on the brief), for Appellee.

Richard A. Simms, Special Assistant Attorney General, State Engineer's Office, Santa Fe, New Mexico, for the State of New Mexico, Amicus Curiae.

The Jicarilla Apache Tribe, residing on a Reservation in the State of New Mexico, appeals from a *sua sponte* Order entered July 19, 1977, dismissing the Tribe's complaint filed December 12, 1975.[1]

A detailed recitation of the multi-faceted litigative history will facilitate our review.

Litigative History

a. State Action

Prior to the filing of the Tribe's complaint in the case at bar, the State of New Mexico, by and through its State Engineer, filed, on March 13, 1975, a complaint in the New Mexico State District Court for the County of San Juan seeking a general water rights adjudication pursuant to New Mexico statutes of all the water rights and uses, both surface and underground, of the San Juan River Stream System, which includes the San Juan River and its tributaries. That action, entitled *State of New Mexico, ex rel. Reynolds, State Engineer* v. *United States of America, et al.*, San Juan County District Court, No. 75-184, was pending on December 12, 1975 when the instant suit was filed. In that action, the United States of America was named as a party defendant pursuant to the McCarran Amendment, 43 U.S.C.A. §666(a), in its own behalf and on behalf of its wards, to-wit, three Indian tribes, including the Jicarilla Apache Tribe, hereinafter referred to as Tribe, who use and occupy federally owned Indian Reservation lands within the stream system in the State of New Mexico.

On April 14, 1975, the United States filed its petition for removal of the action to federal district court. Simultaneously, the United States moved to dismiss the Indian water rights adjudication from the state court's jurisdiction on the premise that the removal jurisdiction of the

[1] The State of New Mexico filed an Amicus Curiae Suggestion for Want of Jurisdiction.

federal district court was derivative from the San Juan County District Court and that the state court lacked jurisdiction to adjudicate the rights of the United States for its Indian wards. The State of New Mexico and some defendants moved to remand.

On October 23, 1975, the federal district court entered an order remanding the cause to the state district court for San Juan County. The Court found that the state court was vested with jurisdiction over the water rights of the United States, as fiduciary on behalf of the three Indian tribes.

The United States again petitioned to remove the proceeding from state court to federal district court. The court denied the petition for removal and granted the motion to remand to the district court of San Juan County based on an express finding that the state court had jurisdiction to adjudicate both the Indian and non-Indian water right claims of the United States. The United States, following this remand, filed a motion to dismiss in the District Court for San Juan County alleging that the state court lacked jurisdiction over the claims on behalf of the three Indian tribes because of alleged conflicts of interest confronting the United States in adequately representing the Indian wards. The members of the Tribe moved to appear *amicus curiae* in support of the United States' motion to dismiss. The motion was denied. The United States was directed to assert and file water right claims on behalf of the three tribes.

Thus, when the instant action was filed, the jurisdictional dispute, i.e., general adjudication of water rights between state court vs. federal court, had been presented several times.

b. Federal Action

The Tribe's complaint, filed on December 12, 1975, in the case at bar, was two-pronged in terms of relief sought.

First, it sought a general adjudication of water rights on the Navajo River System and its tributaries, for use in the State of New Mexico. Second, it sought injunctive relief against the Secretary of the Interior and the United States to restrain the Secretary from diverting water from the Chama-Rio Grande River system through the San Juan-Chama Project insofar as such diversions are in excess of the amounts of water which can be beneficially used by parties who have contracted with the Secretary of the Interior for said waters. The Tribe alleged, *inter alia*, that the diversions by the Secretary violated provisions of the Upper Colorado River Compact.

In its Answer to the Tribe's Complaint, the United States pleaded *inter alia*, (a) that the United States owns lands in the watershed of the Navajo River and its tributaries administered by the Secretary [of Interior] and various government agencies, for which the United States claims the right to impound and divert the waters of the Navajo River and its tributaries, *which claims are adverse to the claims of the Tribe*. . . . . Included in said lands are lands administered by the Bureau of Land Management, lands on which public watersheds and springs are located reserved for public watering purposes, and National Forest lands; and (b) that the United States claims the right to impound, divert and use waters of the Navajo River and its tributaries [and has done so] *but denied that the diversions of the waters from the rivers for the San Juan-Chama Project [reclamation] are adverse to and jeopardize the rights of the tribe.* (Emphasis supplied.) [R., Vol. I, pp. 10, 11.]

Motions to dismiss were also filed. In partial—but significant—resistance to the Motion to Dismiss *in the case at bar*, the Tribe argued, *inter alia:*

> Plaintiff [Tribe] alleges that this Court has jurisdiction under 28 U.S.C. §1362 and 43 U.S.C. §666(a). . . . .

> 28 U.S.C. §1362 states:
>
> The district court shall have original jurisdiction of all civil actions brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.
>
> 43 U.S.C. §666 is the McCarran Amendment.
>
> 28 U.S.C. §1362 enables Indian tribes to bring suits in federal court to protect property granted them by the Federal Government when the United States has declined to act in their behalf. *Standing Rock Sioux Indian Tribe* v. *Dorgan*, 505 F.2d 1135 (C.A. 8, 1974). *Poafpbitty [sic.]* v. *Skelly Oil Co.*, 390 U.S. 365 (1968).
>
> The plaintiff has on numerous occasions demanded that the United States or its appropriate agency take action to protect the Tribe's water rights and that the Secretary and his agencies cease wrongful diversion of water from the Navajo and Little Navajo Rivers in violation of the rights of the Tribe . . . the United States has ignored these demands . . . the issue of Plaintiff's rights to the water claimed [as against the alleged improper diversion by the United States] cannot be raised in that (State) Court . . . The Jicarilla Apache Tribe is not a named party in the (State) case . . . The United States of America is a named party . . . The plaintiff herein cannot, because of its sovereign immunity, be joined as a party . . . The United States as the named defendant is the only party which can protect the Tribe's water rights in (the State action) . . . This places the United States in the position of making claims against itself; an obvious conflict of interest . . . The United States . . . is charged [under the McCarran Amendment] with the duty of representing the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau

> of Sport Fisheries and the three Indian tribes previously named, in their adverse claims to the waters . . . The conflicts of interest inherent in the position of the United States cannot be resolved (in the State Court proceeding) . . . *In this case, claims are asserted against the Secretary separate from the issues of adjudication of water rights.* . . . (Emphasis supplied.)

[R., Vol. I, pp. 34-36.]

Hearing Below

The District Court conducted a hearing July 5, 1977, on the State's Suggestion of Want of Jurisdiction. The Court observed that the Tribe ". . . is claiming that the United States doesn't represent them . . . [and] . . . that they have sovereignty separate and apart from the United States." [R. Vol. II, p. 7.] With respect to the alleged "conflict of interest" problem, the Court requested that the parties address the question whether, without assuming jurisdiction for general adjudication of water rights on the system, the Court should independently entertain jurisdiction of that portion of the Tribe's suit involving the trans-mountain diversion, i.e., the diversions through the San Juan-Chama Project. [R., Vol. II, p. 12.]

a. Jurisdiction Relative to General Water Rights Adjudication

In the course of the hearing the State contended, relating to the general water rights adjudication, that this could only be accomplished in one forum and that the state court action was pending prior to the instant suit. Further, the State argued that the United States is the actual claimant on behalf of the Tribes by virtue of the McCarran Amendment. [R., Vol. II, p. 18.] Counsel for the Tribe challenged the jurisdiction of the state court] to adjudicate the Tribe's claim that the Secretary of the Interior and the Bureau of Reclamation are diverting waters from the San Juan-Chama project in contravention of the Colorado River Compact and the rights of the Tribe. [R., Vol. II, pp. 21-24.]

In response to the Tribe's contention, the Court suggested and later urged that the case be bifurcated in such a manner that the Federal District Court would ". . . hear the questions that involve the trans-mountain diversion separately." [R., Vol. II, pp. 24, 45.] After the Court ordered the dismissal, counsel for the Tribe inquired, "Might I ask are you dismissing the entire complaint?" to which the Court responded, "Yes, I tried to get you to stay in about the trans-mountain water diversion, but you disagreed with that." [R., Vol. II, p. 47.]

The Court's discourse with counsel for the United States in the course of the hearing relative to the jurisdictional issue applicable to the guardianship responsibilities of the United States deserves special note:

> *MR. ESTES:* . . . the United States did not ask to be sued in this particular case, but, now that we have been I haven't seen anything that convinced me that this Court does not have the jurisdiction. I think there is general agreement that over the matter of the San Juan—Chama diversion--whether or not those diversions are within keeping of the law, there seems to be an agreement that the Court could decide that matter.
>
> *THE COURT:* Now, here is their argument. You are guardians of the Apaches and the Navajos and the Utes and, therefore, there is a conflict of interest.
>
> You can't represent any of them and, therefore, they come in on the basis of the decision where our circuit court said that where there is a conflict of interest, the Tribes can get their own lawyers and I have let them proceed on this basis. I don't think the court went so far as to say that you weren't still the guardian of them. They did say where there was a conflict of interest they could get their own lawyers.

MR. ESTES: You have stated that accurately. In this case, we have to deal with the situation that goes one step further. The United States has normally in the New Mexico district of San Juan County asserted that we recognize the conflicts are extremely strong *and have disclaimed the power to recognize the Indian Tribes in this case.* [Emphasis supplied.]

The fact remains that the Tribes feel since the United States has conceded that it was not proper for us to represent them that that does give them some impetus to bring an action to establish their rights.

THE COURT: Well, if they go ahead--the Jicarilla and Apache Tribes--and they do establish their rights, then you may have to abdicate your guardianship over them.

MR. ESTES: No, Your Honor, nowhere in the lawsuit have we felt that we have to do that. That is really all I have to add.

I might say a word about the practical problem that you can't take one stream that is a tributary to another and adjudicate it separately.

THE COURT: If you mean by that that we don't intend to adjudicate the whole thing, the Rio Grande River, we are going to adjudicate it eventually and we have to do it by section and eventually we will have the other rights determined.

MR. ESTES: Proceeding rather similarly to what Your Honor is suggesting--if that could be followed here--it does seem to me that, if some arrangements were made for representation downstream, then a way could be found to adjudicate that decree.

THE COURT: That is why I suggested bifurcating the case, but counsel, for the Indians, they don't agree to this. I said we could bifurcate the case and hear the

questions that involve the trans-mountain diversion separately, and they said "no," that it has to be done in the one as well as in the other.

[R., Vol. II, pp. 43-45.]

We believe that the above-quoted portion of the hearing transcript discloses that notwithstanding the Federal District Court's offer and suggestion that it hear and determine those "conflicts" between the Tribe and the United States involving the diversions of water from the Chama—Rio Grande River system through the San Juan—Chama Project [the matter alleged by the Tribe to arise under laws of the United States invoking the original jurisdiction of the Federal District Court pursuant to 28 U.S.C. § 1362, *supra*], such offer was rejected by Tribe simply and only to preserve the exclusive original jurisdiction over general adjudication of water rights contention.

b. Jurisdiction Relative to Diversion

The State also argued at the motion hearing that in view of the *Akin* decision [Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)] and the specific language of the McCarran Amendment, the state court is the proper forum, under the circumstances, in which to adjudicate the various water right claims, including those of the United States on behalf of the Tribe. [R., Vol. II, pp. 9-10.] Both the State and the Court viewed the controversy involving the trans-mountain diversion of water through the Chama River Project by the United States (involving the alleged conflict of interest between the United States and the Tribe) as severable from the general ajudication of water rights then pending before the state court.

After the Court ruled against the Tribe's contention that the Navajo River is not legally part of the San Juan River

system subject to adjudication in New Mexico, the following colloquy occurred:

> *MR. SIMMS* (for State): I know in the pleadings they [Tribe] said it [the Navajo River] is a separate river [from the San Juan River in New Mexico], but counsel just got up and said it has been litigated as to the rights on that river in the state suit.
>
> *THE COURT:* What is your position on that?
>
> *MR. TAYLOR* (for Tribe): Our position, Your Honor, is that the Navajo River--it lies in Colorado, goes through the San Juan River. It is physically a tributary of the San Juan. Our contention is that it is legally not because . . .
>
> *THE COURT:* Well, I am going to rule against you. It is part of the stream system. I don't think there can be any question of it being part of the San Juan River stream system . . .
>
> *MR. SIMMS:* The fact that it is a part of the stream system goes to the importance of the exclusive jurisdiction (for general adjudication of water rights) of one court. Referring to the map, the river comes down from Colorado in here, hits the San Juan River, and goes right back into Colorado here. There are all kinds of water rights here, some federally owned and some privately owned and no rights in Colorado on the Colorado portion of the Navajo River.
>
> *THE COURT:* I will tell you what worried me a little bit was whether they are trying to stop the United States from that trans-mountain water diversion over into the Chama River.
>
> *MR. SIMMS:* It is the other half of the Jicarilla suit.

> *THE COURT:* Isn't there a suit pending that raises the question? [1]
>
> *MR. SIMMS:* There is a suit pending in the district court of Colorado which raises similar questions, and the Jicarillas have participated in that litigation also but, to go on here . . .
>
> * * *
>
> *THE COURT:* Let me ask you another question. Should I in this suit determine the trans-mountain diversion question without relation to the water rights that are being adjudicated on the San Juan?
>
> *MR. SIMMS:* I think counsel for the Jicarillas could best answer that question.
>
> *Our only interest is that this Court lacks jurisdiction insofar as the adjudication of rights, which is being done in state court.*
>
> *As to the other part of the Jicarilla cause, we have no interest and the state is not suggesting a want of jurisdiction insofar as that portion of their cause is concerned.* (Emphasis supplied.)
>
> * * *
>
> . . . as to the statement that the State of New Mexico has no authority except as administrator for water diverted by non-federal entities, once adjudication is completed in the San Juan court . . . the court would

[1] On March 17, 1975, Tribe filed a Motion to Intervene in a suit filed in the United States District Court for the District of Colorado entitled *Schutz* v. *Stamm*, No. 74-M-318, seeking adjudication of its rights to the use of the waters of the Navajo River and its tributaries and injunctive relief against the Secretary of the Interior as a result of diversion of water under the San Juan-Chama Project. That motion was granted but only insofar as it related to the injunctive relief sought against the Secretary of the Interior.

appoint the state engineer to administer those waters if need be. *If the court did appoint a water master, the water master would have to administer that river in accord with the priorities of all of the federally owned rights and all of the [other] rights of the people on the San Juan and on the Navajo.* (Emphasis supplied.)

* * *

MR. SIMMS: . . . All claimants to the rights to use of the waters of the San Juan River stream system must of necessity be before the [one] court. The United States is the actual claimant on behalf of all three Tribes.

* * *

MR. NORDHAUS (for Tribe): Our contention is that most of the waters that are stored and impounded in Navajo Lake at the Federal Reclamation Project are not subject to the jurisdiction of the state; that before this stream comes back into New Mexico, it actually becomes part of a major federal project over which the state engineer does not have jurisdiction [over the federal user].

[R., Vol. II, pp. 12-19.]

Tribe's prayer for injunctive relief thus related to diversions of water through the San Juan—Chama [Reclamation] Project by the Secretary of the Interior in alleged violation of the provisions of the Upper Colorado River Compact, the Reclamation Development Act of 1974 and the San Juan—Chama Project Act. [R., Vol. I, p. 14.] This portion of the Tribe's complaint, as we have previously noted, was the primary "vehicle" employed in a "bootstrapping" sense to convince the Court that it had pendent jurisdiction to entertain the Tribe's complaint by virtue of 28 U.S.C. §1362, *supra.*

Based on §1362, *supra,* the Tribe urged that assuming *arguendo* the San Juan District Court had jurisdiction, the federal district court should still exercise its pendent jurisdiction discretion in order to ". . . prevent multiple litigation and its attendant cost to the Jicarilla and Apache Tribes." [R., Vol. II, p. 28.]

The Dismissal Order

The District Court's order dismissing Tribe's Complaint predicated on the State's Suggestion for Want of Jurisdiction followed extensive pleadings, briefing and oral arguments. The Court found and concluded, *inter alia,* that: an action was pending in the New Mexico State District Court for the County of San Juan at the time Tribe filed the instant action; the state action, entitled *State of New Mexico, ex rel. S.E. Reynolds, State Engineer* v. *United States of America,* et al., No. 75-184, is a case brought by the State for the purpose of a general adjudication of rights to the use of the water in New Mexico from the San Juan River and its tributaries, including the Navajo River; the United States of America was joined as a defendant in the state adjudication proceeding under the authority of the so-called McCarran Amendment, 43 U.S.C. §666, both in its own behalf and on behalf of the Navajo, Ute Mountain Ute, and Jicarilla Apache Tribes of Indians; the state district court has exclusive jurisdiction to proceed to determine all rights to the use of the water in New Mexico from the San Juan stream system, including the claims of the United States on behalf of the Tribe to the waters of the Navajo River; Section 75-4-6, N.M.S.A. (1953 Comp.) provides that "[T]he Court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved . . ." which Provision is binding on the United States as a defendant in the state action by virtue of 43 U.S.C. §666, which provides in part that "[t]he United States, when a party to any such

[stream adjudication] shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto"; in light of *Colorado River Water Conservation District, et al.* v. *United States, supra*, the effect of N.M.S.A. §75-4-6, is made applicable to the United States by 43 U.S.C. §666, precluding the Federal District Court from the contemporaneous exercise of its concurrent jurisdiction.

Issues on Appeal

On appeal, Tribe contends that the District Court erred in dismissing its Complaint in that: (1) the Federal District Court for the District of New Mexico has exclusive jurisdiction to adjudicate the water rights of the Tribe inasmuch as (a) the New Mexico Enabling Act and Constitutional Disclaimer precludes state court jurisdiction, and (b) the McCarran Amendment does not repeal the Disclaimer provision, (2) the Federal District Court has exclusive jurisdiction of the Tribe's claim against the Secretary of the Interior for wrongful diversion of water through the San Juan—Chama Project, and (3) the Federal District Court has pendent jurisdiction (which it may decline to exercise) to adjudicate the claims of the Tribe to the Navajo River, as a stream system separate from the San Juan River Stream System. Further, Tribe argues that the order is final and appealable.

The United States also appeals, contending that (1) the state court lacks jurisdiction to adjudicate the water rights of Indian tribes in New Mexico in light of the Disclaimer language contained in the New Mexico Enabling Act and the State Constitution, which have not been repealed, (2) the Federal District Court is not bound by state statutes giving state trial courts exclusive jurisdiction, and (3) this court has appellate jurisdiction.

The State of New Mexico, ex rel. S.E. Reynolds, State Engineer, has filed an amicus brief. It also presented oral

argument on appeal. It is the contention of the State that: (1) The District Court for the County of San Juan, New Mexico, is vested with exclusive jurisdiction to adjudicate the rights to the use of the waters of the San Juan River stream system in that, (a) the Federal District Court lacks jurisdiction either on the basis of the exclusive jurisdiction rule or discretionary considerations of wise judicial administration, (b) the Disclaimer provisions of the New Mexico Constitution are irrelevant to the adjudicatory jurisdiction of the San Juan County District Court, and (c) there are no provisions in the New Mexico Enabling Act or the Executive documents establishing the Jicarilla Reservation which make the Reservation an exclusive federal enclave; (2) the Jicarillas cannot be heard to complain of the District Court's dismissal of their claim against the Secretary of the Interior inasmuch as that claim was dismissed at the urging of the Jicarillas; (3) the determination of the water rights of the United States on behalf of the Jicarilla Apache Tribe cannot be bootstrapped out of the San Juan adjudication in the guise of an injunction action against the Secretary of the Interior; and (4) the District Court's order dismissing the Jicarilla action should have been reviewed by writ of mandamus rather than by appeal.

I.

Tribe argues, and we agree, that the practical effect of the District Court's dismissal order is the termination of the entire case in Federal District Court. There was nothing tentative, informal or incomplete about the order. In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), the Court stated that the finality requirement should be given a "practical rather than a technical construction." Here, the order of dismissal disposed of the whole case, including the Tribe's contention that because of federal law the state court was without jurisdiction to adjudicate the water rights of the Tribe.

Furthermore, the record establishes that this isssue is capable of repetition--evidence the previous jurisdictional disputes and attendant orders involving the proper forum. We believe that the order falls "four square" within the so-called collateral order doctrine of *Cohen* and Swift and Company Packers v. Compania Colombiana Del Caribe, S.A., 339 U S. 684 (1950) which identify these three characteristics of an order as meeting the "finality" requirement: (1) the order must be final in terms of determination of the claim of right separable from the rights asserted in the action (complaint), (2) the issue or issues determined by the order must be too important to be denied review in that present and serious questions of unsettled law are involved, and (3) the primary issue of jurisdiction is of such general importance beyond the immediate concern of the litigants that it requires settled determination. The "finality" requirement was given a broadened base for appellate review purposes in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), where the court re-affirmed the *Cohen* test of "practical rather than a technical construction" and went one step further. It determined that courts of appeal have the power to answer questions (and decide issues) fundamental to the further conduct of the case in those instances of "marginal" finality. The *Cohen* rule was again re-affirmed in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). *See also:* Sherman v. American Fedejation of Musicians, 588 F.2d 1313 (10th Cir. 1978); Seiffer v. Topsy's International, Inc., 520 F.2d 795 (10th Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976).

In accepting Tribe's contention that the practical effect of the order is termination of the entire case in federal court, we reject the State's contrary contention. State contends that because both the Tribe and the United States are in agreement on the issues on appeal (just as they were aligned in the District Court), there is, in truth, no controversy between the *parties* and thus no real, substantial

"case or controversy" between those who appear as adverse parties to the suit. The State, accordingly, refers to the alignment as one of "tactical convenience" and a "contrived appeal in which there is no adversity" and the attendant absence of a justiciable controversy on appeal. [Supplemental Memoranda of Amicus Curiae, p.6.] Predicated thereon, State contends that the Tribe's sole review of the order of dismissal was by mandamus pursuant to Rule 21 of the Rules of Appellate Procedure. [Supplemental Memorandum of Amicus Curiae, p. 4.] This argument fails, in our view, simply because the Tribe's complaint satisfies the threshold requirement of Art. III of the Constitution that one who seeks to invoke the power of the federal courts must allege an actual case or controversy. Tribe contends, *inter alia,* that under federal law and a specific statute (28 U.S.C. §1362), the Federal District Court has original and exclusive jurisdiction relative to the general water rights adjudication. The Supreme Court has held that when Congress enacts statutes creating legal rights, the invasion thereof creates standing even though no injury would exist without the statute. Linda R.S. v. Richard D., 410 U.S. 614 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). The Tribe argues that inasmuch as it is not a named party to the State District Court (San Juan County) proceeding and because the United States as a named defendant is the only party who can protect the Tribe's water rights in the state proceeding, the Tribe is threatened with real and immediate injury in fact because the "... United States [is] in the position of making claims against itself; an obvious conflict of interest." [R., Vol. I, P. 36.] We conclude that the threatened injury, as alleged and argued, is not abstract but is real rather than conjectural or hypothetical. Golden v. Zwickler, 394 U.S. 103 (1969); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

Further, we believe that the jurisdictional dispute is ripe for repetitiveness in the context of water rights adjudications in the states of this Circuit alone. Accordingly, it cannot be said that the jurisdictional claim raised is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974). *See also:* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Hagans v. Lavine, 415 U.S. 528 (1974). In Bell v. Hood, 327 U.S. 678, 684 (1946) the Court stated that "... where federally protected rights have been invaded ... courts will be alert to adjust their remedies so as to grant the necessary relief."

Holding, as we do, that this Court is vested with appellate jurisdiction we turn now to a discussion and disposition of the basic substantive issues raised.

II.

Tribe and the United States contend that the District Court erred in dismissing Tribe's complaint and action for want of subject matter jurisdiction because, (a) the Federal District Court for the District of New Mexico has exclusive jurisdiction to adjudicate the water rights of the Tribe inasmuch as the Disclaimer [of jurisdiction by the State] in both the New Mexico Enabling Act and the New Mexico Constitution precludes state court jurisdiction, and (b) the McCarran Amendment does not grant the State of New Mexico subject-matter jurisdiction and it does not repeal the Disclaimer provision.

Preliminary to our discussion and disposition of the aforesaid contentions, we deem it necessary to analyze some of the fundamental law relating to the unique relationship between the United States government and the Indian tribes.

Since the year 1871, Indian tribes have been subject to the power and authority of the laws of the United States by means of the exercise of its legislative power over them. Prior thereto the various tribes were recognized by the United States as possessing the attributes of separate nations to the extent that treaties were entered into with them. Thus, since 1871 the Congress has regulated Indian affairs and the United States government serves as guardian of the Indian tribes, nations, or bands. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). It has been said that, in a general way, the relationship now between the United States government and the Indian tribes is that of superior and inferior, in that the government has assumed, in large measure, the care and control of Indians and Indian Tribes. Montoya v. United States, 180 U.S. 261 (1901). The paradox, so to speak, is that even though Indian tribes have been held to have a [sovereign] status higher than the states they are nonetheless limited in sovereign power to the extent required of them by the superior sovereign, the United States. Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

Congress possesses paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to the control of the judicial branch of government. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The propriety or justification of action by the Federal Government, legislatively mandated, relative to Indian lands and properties is a political rather than a judicial question and that power is plenary. Oneida Indian Nation v. County of Oneida, *supra;* United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941).

It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian

country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965); Organized Village of Kake v. Egan, 369 U.S. 60 (1962). The reach of the protective guardian arm of the United States Government is such that in light of the vulnerability of the Indian tribes and because of the special duties assumed by the United States in their protection, special benefits and preferences accorded Indians are not violative of the Equal Protection principle. Morton v. Mancari, 417 U.S. 535 (1974). *Mancari, supra,* and Bryan v. Itasca County, 426 U.S. 373 (1976), stand for the proposition that statutes enacted for the benefit of the dependent Indian tribes are to be liberally construed and doubtful expressions resolved in favor of the Indians.

In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) the Court observed that modern cases tend to ". . . avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power" in order to ascertain whether state action, absent a specific Act of Congress, infringes upon the rights of the Indians to make their own laws and to be governed by them.

We turn now specifically to the important jurisdictional issue involving the general water rights adjudication. Significant, we believe, is that the general water rights of the San Juan River and its tributaries in the State of New Mexico sought to be adjudicated include those which are federally owned and established. Federal law governs in determining the extent and status of such rights. *See:* United States v. New Mexico, ____ U.S. ____, 98 S. Ct. 3012, 46 U.S.L.W. 5010 (July 3, 1978), where the Court said:

> Recognition of Congress' power to reserve water for land which is itself set apart from the public domain, [appurtenant lands withdrawn from the public domain for specific federal purpose as identified in Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963); Cappaert v. United States, 426 U.S. 128 (1976)] however, does not answer the question of the amount of water which has been reserved or the purposes for which the water may be used. *Substantial portions of the public domain have been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments.* (Emphasis supplied.)
>
> [Slip Opinion, pp. 2, 3.]

This Court has recognized that the federally reserved water rights are subject to the management and control of the United States but that any ". . . collision between private rights and federal rights does not affect the validity of the right of the State to maintain the suit [for water adjudication]. . . . *See also:* Colorado River Water Conservancy [sic.] District v. United States, ____ U.S. ____ , 96 S.Ct. 1233 . . . (1976)." State of New Mexico v. Aamodt, 537 F.2d 1102, 1108 (10th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977). We there further observed:

> . . . The obligation of the United States to fulfill its fiduciary duties to the Pueblos does not diminish the rights of the Pueblos to sue on their own behalf. See *Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365 . . . and cases there cited. The instant case is not like Pueblo of *Picuris* v. *Abeyta,* 10th Cir., 50 F.2d 12 where the private counsel for a pueblo and counsel for the United States took contrary positions on the appeal of a case and the court held that the Attorney General of the United States, not the private counsel, controlled the course of the litigation. *Ibid* at 14.
>
> 537 F.2d at p. 1107.

The above recitals, we believe, provide authoritative credence to the contention that the United States is the proper party defendant in *any* general water rights adjudication proceeding, whether brought in federal court or state court, relating to federally created water rights, including those reserved for use by Indian tribes. This does not mean that Indian tribes using the federally reserved waters are not granted the right of intervention in any such adjudication, to be represented by private counsel independent of any possible conflict of interest. *See:* State of New Mexico v. Aamodt, *supra*, at p. 1107. We noted there that the Commissioner of Indian Affairs properly and fairly exercised his discretion pursuant to 25 U.S.C. §2 in authorizing that "private counsel independent of any conflict of interest should be furnished to represent the Indian interests." We further stated that the intervention on behalf of the Pueblos was one of right under Rule 24(a), F.R. Civ. P., 28 U.S.C.

A recent pronouncement by the United States Supreme Court in the area of federal-state court jurisdiction for general adjudication of water rights occurred in the case of United States v. State of New Mexico, *supra*, (July 3, 1978). That litigation was generated when the State of New Mexico filed a complaint-in-intervention in what was initially a private action in a New Mexico State District Court seeking the general adjudication of water rights for the Rio Mimbres and its tributaries. The United States was joined as a party defendant pursuant to the McCarran Amendment, 43 U.S.C. §666(a). In footnote 1, the Supreme Court recognized the state court's jurisdictional authority as applicable to the adjudication of all rights to the use of water of a river system or other source including ". . . *the reserved rights of the United States. See: United States v. District Court for Eagle County, 401 U.S. 520 (1971); United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971).*" (Emphasis supplied.)

In United States v. State of New Mexico, *supra*, the State District Court found that the United States, in setting the Gila National Forest aside from other public lands, reserved the use of such water ". . . as may be necessary for the purposes for which [the land was] withdrawn" but that such purpose[s] did not include recreation, aesthetics, wildlife preservation or cattle grazing. The United States was unsuccessful in its appeal to the Supreme Court of New Mexico. The United States Supreme Court granted certiorari ". . . to consider whether the Supreme Court of New Mexico had applied the correct principles of *federal law* in determining petitioner's [the United States'] reserved rights in the Mimbres." (Emphasis supplied.) We conclude that a careful reading of that opinion can only lead one to conclude that the Supreme Court recognized the jurisdiction of the state courts by virtue of the McCarran Amendment to undertake general water rights adjudication of a river system or other source applicable to *all* federally reserved water rights, including those waters reserved for the use of Indian tribes. In so concluding, we observe that the only prior impediment to the joinder of the United States as a party defendant in a state court general water right adjudication proceeding was its sovereign immunity, waived by the consent granted under the McCarran Amendment. Sovereign immunity was the *sole* and only legal impediment, our research indicates, to joinder of the United States is a party defendant in state court proceedings relating to federally reserved water rights, including those waters reserved for use by Indian tribes.

In the latter sense, i.e., the reservation of water by the United States for use by the Indian tribes, we are confronted, for the first time, with the contention that because of New Mexico's Disclaimer, a special exception, in effect, must be "carved out" from the McCarran Amendment consent. We now address that argument.

III.

Section 2 of New Mexico's Enabling Act, 36 Stat. 557, 558-559 (June 20, 1910), provides in applicable part:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . .

This section of the Act further states that the convenant is "irrevocable without the consent of the United States and the people of said State."

Article XXI of the Constitution of New Mexico provides in pertinent part:

PREAMBLE

> In compliance with the requirements of the Act of Congress, entitled, "An act to enable the people of New Mexico to form a Constitution and state government and be admitted into the Union on an equal footing with the original states; and to enable the people of Arizona to form a Constitution and state government and be admitted into the Union on an equal footing with the original states," approved June twentieth, nineteen hundred and ten, it is hereby provided:. . . .
>
> Sec. 2.

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same [lands] shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . .

By 1910, the date of the enactment of New Mexico's Enabling Act, both the Congress and the United States Supreme Court had established a procedure whereby Indian reservations might be created as exclusive federal enclaves within states and territories, similar to military reservations created under the Arsenals and Dockyards Clause (U.S. Const. Art. I, §8, C1. 17). This procedure was followed exclusively only with respect to the Kansas Indians. A different procedure was followed with respect to the grant of New Mexico's statehood. In any event, today there is no exclusive federal jurisdictional Indian Reservation in the United States.

Public Law 280, was originally enacted by Congress as the Act of August 15, 1953, ch. 505, §§1-7, 67 Stat. 588, P.L. 83-280, and is partially codified at 18 U.S.C. §1162 and 28 U.S.C. §1360, as amended. The Act authorized the states to assume civil and criminal jurisdiction over Indians residing on Indian reservations. Sections 6 and 7 provide:

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to

remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

This Act became law some thirteen months *after* the McCarran Amendment was enacted. The McCarran Amendment, we reiterate, grants the consent of the United States to be joined as a party defendant in any state court proceeding for the adjudication of rights to the use of water of a river system or other source. The pertinent portion of the McCarran Amendment here involved is 43 U.S.C. §666(a), to-wit:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a water system or other source. . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . .

The "Disclaimer" terminology of the various Enabling Acts, constitutions and statutes varies. The Colorado "disclaimer" contained in its Enabling Act exempts "Indians not taxed" from the proviso that the Constitution of the state "shall be republican in form, and make no distinction in civil or political rights on account of race or color." Enabling Act, Art. 4, Vol. I, C.R.S. 1973. Congress did not distinguish between "Disclaimers" based on the language of each in the 1953 Act. Our limited research indicates that in 1953 there was "disclaimer" language of various kinds in the state constitutions of Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming. Some eleven states, including Colorado and Kansas, enacted "disclaimer" statutes. None of the western states assumed full jurisdiction pursuant to the 1953 Act. In fact, six states assumed only partial jurisdiction. Colorado, Kansas, New Mexico, Oklahoma and Wyoming did not assume any effective jurisdiction. Such failure, argues the Tribe, is fatal, citing to Kennerly v. District Court, 400 U.S. 423 (1971) for the rule that the procedures specified in Pub. L. 280 are exclusive (i.e., amendment of state constitutions or statutes) to the assumption [by the states] of civil and criminal jurisdiction. Furthermore, Tribe contends that the McCarran Amendment neither repeals the disclaimer provisions of the various states nor grants the consent of the United States otherwise. Thus, the Tribe argues that because the McCarran Amendment does not mention the disclaimer provisions or Indians, it did not amend, modify or repeal New Mexico's disclaimer. Reliance is placed on language contained in the case of Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (N.M. 1961), *cert. denied*, 368 U.S. 915 (1961), for the point that the State can only exercise jurisdiction over Indians if the federal government has specifically granted it. This point, while correct, in our view is inapposite.

We hold that the United States is the proper party defendant--and was clearly so intended to be by the Congress in the enactment of the McCarran Amendment--to represent, as guardian, the federally reserved water rights of the Indian tribes in any state court general water rights adjudication proceeding to which the United States is properly named and served as a party defendant. The legislative history[2] of the McCarran Amendment giving consent to join the United States manifests the Congressional intent to accomplish in one forum the general settlement of water rights of many users of a river system or other source. It is, of course, only by reason of the McCarran Amendment, as interpreted by the United States Supreme Court, that the United States may be so named as a party

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[2] "In the administration of and the adjudication of water rights under state laws the state courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order of [sic.] action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a state court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts."

S. Rep. No. 755 at 4-5, 82d Cong., 1st Sess. (1951).

This identical language was relied upon by the Supreme Court in Colorado River Water Cons. Dist. v. United States, *supra*, for the statement: "Not only the [McCarran] Amendment's language, but also its underlying policy, dictates a construction including Indian [water] rights in its provisions. . . . Thus, bearing in mind the nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." 17 (Footnote omitted.)

424 U.S. at pp. 810, 811.

defendant in the state court even though the suit arises under a state statute and the federally reserved rights involve an interpretation and application of federal law. The rationale for the principle was succinctly stated by the Supreme Court in Will, U.S. District Judge v. Calvert Fire Insurance Co., 437 U.S. 655 (1978):

> It is well established that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910). It is equally well settled that a district court is "under no compulsion to exercise that jurisdiction," *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 494 (1942), where the controversy may be settled more expeditiously in the state court. Although most of our decisions discussing the propriety of stays or dismissals of duplicative actions have concerned conflicts of jurisdiction between two federal district courts, *e.g.*, *Kerotest Mfg. Co.*, v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952); *Landis* v. *North American Co.*, 299 U.S. 248 (1936), we have recognized the relevance of those cases in the analogous circumstances presented here. See *Colorado River*, 424 U.S., at 817-819. In both situations, the decision is largely committed to the "carefully considered judgment," *Id.*, at 818, of the District Court.
>
> This power has not always been so clear. In *McClellan*, on facts similar to those presented here, this Court indicated that the writ might properly issue where the District Court had stayed its proceedings in deference to concurrent state proceedings. Such an automatic exercise of authority may well have been appropriate in a day when Congress had authorized fewer claims for relief in the federal courts, so that duplicative litigation and the concomitant tension between state and federal courts could rarely result.

However, as the overlap between state claims and federal claims increased, this Court soon recognized that situations would often arise when it would be appropriate to defer to the state courts.

> "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Brillhart, supra,* at 495.

The decision in such circumstances is largely committed to the discretion of the District Court. 316 U.S. at 494. Furthermore, *Colorado River, supra,* at 820, established that such deference may be equally appropriate even when matters of substantive federal law are involved in the case. (Footnote omitted.)

437 U.S., at 662-664.

In Cappaert v. United States, 426 U.S. 128, 145 (1976) the Supreme Court stated: "Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U.S.C. §1345 to adjudicate the water rights claims of the United States. Colorado River Water Cons. Dist. v. United States, 424 U.S., at 807, 809. The McCarran Amendment, 66 Stat. 560, 43 U.S.C. §666, did not repeal §1345 jurisdiction as applied to water rights."

In our view, there exists no conflict between the state court assumption of jurisdiction governing general water rights adjudication, including that of federally reserved water rights, involving the joinder of the United States as proper party defendant to represent the interests of the federally reserved water rights, and the Disclaimer provi-

sions. The basic, fundamental reason is that the United States is the proper party to protect *all* federally reserved water rights, including those set aside for use by the Indian tribes.

Moreover, in view of the McCarran Amendment and the strong policy behind it outlined in the *Colorado River* opinion of the Supreme Court, we feel that subject matter jurisdiction should be recognized as allowable in the state courts of the general water rights adjudication proceeding, there being implicit modification of the Enabling Act to that extent, as necessary. And the state statute, §74-4-6, N.M.S.A. (1953) affords an adequate state court jurisdictional basis, without any exception as to Indian reservations, for disposition of this water adjudication proceeding. *See:* State ex rel Reynolds v. Lewis, 545 P.2d 1014 (N.M. 1976).

It follows that the waiver of sovereign immunity accomplished pursuant to the McCarran Amendment supports the state's claim here. Cappaert v. United States, *supra;* Colorado River Water Conservation District v. United States, *supra.* It is significant to note that in United States v. District Court in and for Eagle County, Colorado, *supra,* the United States moved to dismiss an action brought for general water rights adjudication in a Colorado state court based upon the contention that the McCarran Amendment did not constitute the consent of the United States to submit to a state court adjudication of the reserved water rights of the United States inasmuch as the federally reserved water rights may potentially be at war with water rights based on the state's appropriation system. The Supreme Court rejected the argument advanced by the United States that the McCarran Amendment granted consent to join the United States as a party defendant in a state court adjudication proceeding *only* if the water rights of the United States were acquired pursuant to state law. The Court emphatically held that the state court was dealing with an all-inclusive statute concerning "the ad-

judication of rights to the use of water of a river system" which includes appropriative rights which the court found to specifically include those waters reserved by the United States for the use and benefit of Indian reservations. The court cited Arizona v. California, 373 U.S. 546 (1963).

We believe that the following language in Colorado River Water Conservation District v. United States, *supra*, is clear on the effect of the McCarran Amendment to reserved rights held by the United States on behalf of Indians:

> ... This is a question not previously squarely addressed by this Court, and given the claims for Indian water rights in this case, dismissal clearly would have been inappropriate if the state court had no jurisdiction to decide those claims. We conclude that the state court had jurisdiction over Indian water rights under the amendment.
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> *United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971) and *United States* v. *District Court for Water Div. 5*, 401 U.S. 527 (1971) held that the provisions of the McCarran Amendment whereby "consent is ... given to join the United States as a defendant in any suit (1) for the adjudication ... or (2) for the administration of [water] rights, where it appears that the United States is the owner ... by appropriation under state law, by purchase, by exchange, or otherwise ...," subject federal reserved rights to general adjudication in state court proceedings for the determination of water rights. ... Though *Eagle County* and *Water Div. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the Amendment. 401 U.S., at 523.

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions.
>
> 424 U.S. at pp. 809, 810.

Footnote 20 in Colorado River Water Conservation District, *supra*, is, in our view, of special application here:

> To be sure, 25 U.S.C. §1322(b) and 28 U.S.C. §1360(b) provide that nothing in those sections "shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right of possession of [any real or personal property, including water rights, belonging to any Indian or any Indian Tribe ... that is held in trust by the United States]." This provision in both sections, however, only qualifies the import of the general consent to state jurisdiction given by those sections. *It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment.* A contrary conclusion is foreclosed by the principle of construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550-557 (1974). (Emphasis supplied.)
>
> 424 U.S. at pp. 812, 813.

When the Congress was dealing with the McCarran Amendment, it was deemed to be fully cognizant of the provisions of 25 U.S.C. §1322(b) and 28 U.S.C. §1360(b). There is authority indicating that the Congress specifically rejected an exemption of reserved Indian water rights from the McCarran Amendment. The Court, in *Colorado River Water Conservation District, supra*, specially observed that when the Senate Judiciary Committee rejected a Department of Interior recommendation that Indian water rights be exempted from the Act that this amounted to a rejection of the proposition that special treatment should

be accorded federally reserved water rights for Indian users. 424 U.S. at p. 812. Furthermore, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. Colorado River Water Conservation District v. United States, supra; Preiser v. Rodriguez, 411 U.S. 475 (1973); Glover Construction Co. v. Andrus, 591 F.2d 554 (10th Cir. 1979); Sutherland, Statutory Construction, 4th Ed., Vol. 2A, §51.05.

IV.

State contends that a further basis supporting the District Court's dismissal for want of jurisdiction is the principle that the State's disclaimer of all right and title to Indian lands applies only to a proprietary interest in such lands. This argument was adopted by the Supreme Court of New Mexico in the case of State ex Rel. Reynolds v. Lewis, 545 P.2d 1014 (1976), in reliance on Kake Village v. Egan, 369 U.S. 60 (1962). The contention is particularly persuasive in light of the non-proprietary intent in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment.

Kake v. Egan, *supra*, involved an appeal by the Secretary of Interior from a decision by the Alaska Supreme Court upholding the denial of the Secretary's petition to enjoin the State of Alaska from forbidding the Thlinget Indians residing in incorporated communities from the use of salmon traps. The United States Supreme Court noted that the Alaska Statehood Act contained three provisions relating to Indian property: (a) the state must disclaim right and title to such property, (b) the United States retains "absolute jurisdiction and control" over right and title of Indian property, and (c) the state may not tax Indian property. Thus, although the terminology varies somewhat from the New Mexico Disclaimer we conclude

that, in legal effect, there is no distinguishable difference. The Court interpreted the Alaska provisos as follows:

> The provision for "absolute jurisdiction and control" [by the United States] received little attention in Congress. . . . Mr. Barney [on behalf of the Justice Department], denied that the provision would deprive the State of "political jurisdiction" over disclaimed properties. . . .
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> * * *
>
> . . . Provisions retaining federal "jurisdiction" and "absolute jurisdiction" were considered interchangeable by at least one committee, which reported the disclaimer in the Alaska bill as "almost identical" with those of the preceding 13 admission Acts. S. Rep. No. 315, 82d Cong., 1st Sess. 15 (1951).
>
> * * *
>
> . . . The Senate amendment was designed simply to make clear what an examination of past statutes and decisions makes clear also: that the words "absolute jurisdiction and control" are not intended to oust the State completely from regulation of Indian "property (including fishing rights)."
>
> 369 U.S. at pp. 69-71.

The Court, after reviewing a number of its prior decisions, also observed:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.
>
> 369 U.S. at p. 75.

In McClanahan v. Arizona State Tax Comm'n, *supra*, the Supreme Court held that Arizona had no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources. This holding was predicated on the proposition that by imposing the tax, Arizona interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The Arizona Enabling Act, like that in the case at bar, whose language is duplicated in the Arizona Constitution, disclaims state title over Indian lands and provides that such lands remain "under the absolute jurisdiction and control of the Congress of the United States." The Arizona Supreme Court, relying upon Organized Village of Kake v. Egan, *supra*, held that the Enabling Act permitted concurrent state jurisdiction so long as tribal self-government remained intact and that an individual state income tax did not interfere with tribal self-government.

In *McClanahan, supra*, the Supreme Court, in reversing, placed great emphasis upon the terms of the Navajo Treaty of July 15, 1868, saying:

> . . . [I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation. See Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S., at 687, 690; Williams v. Lee, supra, at 221-222.

* * *

> Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the states lacked jurisdiction over Navajos living on the reservation.
>
> 411 U.S. at pp. 174, 175.

Thus, while the Court in *McClanahan, supra*, did observe that the Arizona Enabling Act was silent on the specific question of tax immunity, still the Congressional intent to maintain the tax-exempt status of reservation Indians is clear in light of the Buck Act.[3] Further, the Supreme Court distinguished Organized Village of Kake v. Egan, *supra*, on the basis that *Kake* did not purport to provide guidelines for the exercise of state authority (for a state to assume civil and criminal jurisdiction over Reservation Indians) in areas set aside by treaty for the exclusive use and control of Indians. Even though the Court did not suggest or imply that Arizona would "necessarily be empowered" to impose the state tax had it followed the procedures outlined in 25 U.S.C. §1322, *et seq.*, the Court obviously placed weight on the fact that Arizona had not acted.

McClanahan, supra, held that state taxing jurisdiction was pre-empted by applicable treaties or statutes and this was reaffirmed in Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976). The Court there upheld a federal district court's order barring Montana from imposing cigarette sales taxes with respect to on-reservation sales by tribal members to Indians residing thereon. *Moe, supra*, held that the state tax statute ran afoul of Congressional enactments dealing with the affairs of reservation Indians and in so doing quoted from United States v. McGowan,

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[3] The Buck Act, 4 U.S.C. §105, *et seq.*, provides comprehensive guidance relative to state sales or use taxation applicable to those living within federal areas. The Act specifically exempts reservation Indians from its coverage. 4 U.S.C. §109.

302 U.S. 535, 539 (1938): "Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments." 425 U.S. at p. 483.

In Draper v. United States, 164 U.S. 240 (1896) the Court construed the Montana Enabling Act which contained a disclaimer identical to that of New Mexico and Arizona. The Court concluded that nothing therein could be construed to constitute exclusive federal jurisdiction. The significance of this opinion is, we believe, spelled out by this language in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973):

> . . . The upshot [of more individualized treatment of certain treaties and specific federal statutes, including statehood enabling legislation as they, taken together, affect the respective rights of states, Indians and the Federal Government] has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. *Organized Village of Kake,* supra at 75; *Williams* v. *Lee,* 358 U.S. 217 (1959); *New York, ex rel. Ray* v. *Martin,* 326 U.S. 496, 499 (1946); *Draper* v. *United States,* 164 U.S. 240 (1896).
>
> 411 U.S. at p. 148.

We thus conclude, as did the New Mexico Supreme Court in *Lewis, supra,* and Sangre De Cristo Development, Inc. v. City of Santa Fe, 503 P.2d 323 (N.M. 1972), cert. denied, 411 U.S. 938 (1973), that the New Mexico constitutional disclaimer of right and title to Indian lands prohibits the state from asserting a proprietary interest in Indian lands, but does not constitute a disclaimer of state control which does not "interfere with reservation self-government or impair a right granted or reserved by federal

law." In Montoya v. Bolack, 372 P.2d 387 (N.M. 1962), the Court said:

> Congress itself has recognized that the Indians must at some time become an integral part of the country and gradually be assimilated into society. . . . The states are authorized to enforce sanitation and quarantine laws on a reservation, to make inspections for health and educational purposes, and to enforce compulsory school attendance . . . [citing to express congressional enactment].
>
> 372 P.2d at 393.

We have recently stated that "In summary, the cases stress that regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms." United States v. State of New Mexico, 590 F.2d 323, 328 (10th Cir. 1978). Such delegation was precisely the effect of the McCarran Amendment.

Conclusion–Disposition

We thus hold that the District Court did not err in dismissing that portion of the Tribe's complaint seeking a general water rights adjudication of the San Juan River stream system. We agree with the District Court's dismissal of this portion of the complaint in light of the fact that an identical action had been previously filed in the state court and was pending when the Tribe's complaint was filed in the federal District Court.

We conclude, however, that the District Court erred in dismissing that portion of the Tribe's complaint seeking an injunction against the Secretary of the Interior for alleged wrongful and excessive diversions of water from the San Juan—Chama Project in violation of the rights of the Tribe. We also conclude that the San Juan—Chama diversion claim and the general water rights adjudication pro-

ceeding do not arise from a "common nucleus of operative fact." Hagans v. Lavine, 415 U.S. 528 (1974); United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), *cert. denied*, ___ U.S. ___ (1979); Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836 (4th Cir. 1974); Lanning v. Serwold, 474 F.2d 716 (9th Cir. 1973); 3A Moore's Federal Practice, §18.07[1.-3]. Thus no pendent jurisdiction could be exercised to retain the general water rights adjudication proceeding in the federal District Court. At least some of the Tribe's claims against the Secretary of the Interior arise under federal law. Certainly no one contends that the claims are insubstantial. Accordingly, we view these claims as coming within the plain terms of 28 U.S.C. §1362 as a civil action brought by an Indian tribe arising under the Constitution, laws or treaties of the United States. Colorado River Water Conservation District v. United States, *supra*, refers to the "unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817. California v. United States, 438 U.S. 645 (1978) does not dictate otherwise. The court there held that state substantive water law will generally apply in relation to a federal water appropriation permit obtained from a state absent specific Congressional directives inconsistent with state law. That opinion does not, however, reach the state versus federal court jurisdictional issue presented in the case at bar.

We affirm the District Court's dismissal of the Tribe's complaint seeking a general water rights adjudication of the San Juan River stream system. We reverse the District Court's dismissal of the Tribe's complaint seeking injunctive relief against the Secretary of the Interior relative to the San Juan—Chama Project diversion claims, and remand to the District Court for adjudication of the Tribe's claims relative thereto.

APPENDIX C

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

CIVIL NO. 75-742P

JICARILLA APACHE TRIBE,

Plaintiff,

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA; DENVER-RIO GRANDE WESTERN RAILWAY CO., MANUELITO GARCIA, ESTEBAN GOMEZ, OLAN CROWLEY, LEOPOLDO MARTINEZ, RAFAEL JARAMILLO, JOSE F. MARTINEZ, JOSE I. GARCIA, CLOTILDA MUNOZ, and all unknown claimants of interest to water in the Navajo River and waters tributary thereto in the State of New Mexico,

Defendants.

COMPLAINT

The Jicarilla Apache Tribe, hereinafter called the "Tribe", for its claim against the Defendants, The United States, the Secretary of the Interior of the United States, hereinafter called the Secretary, and the other defendants named herein, states as follows:

1. This is a civil action the subject matter of which is a general adjudication of the rights of the Tribe, the United States and other defendants in New Mexico to impound or divert the waters of the Navajo River system and waters tributary thereto, for use in the State of New Mexico. This Court has jurisdiction under Section 1362 of Title 28, and Section 666-a of Title 43 of the United States Code.

2. The Tribe is an Indian tribe organized and incorporated under the laws of the United States of America (48 Stat. 987 et seq., 25 U.S.C. 476-477), residing on a reservation in northwest New Mexico, established by Executive Order of the President of the United States on February 11, 1887. Rights of the Tribe to reservation lands and waters for use on the reservation are governed by and arise under the Constitution and laws of the United States of America.

3. The Navajo River and its tributaries, including the Little Navajo River, rise in the State of Colorado, flow a short distance through private lands in the State of New Mexico, then through the Jicarilla Apache Reservation and return to the State of Colorado at the boundary of the Jicarilla Apache Reservation and the Southern Ute Reservation, and constitute an independent and separate stream system of the Upper Colorado Basin. The confluence of the Navajo River with the San Juan River is located on the Southern Ute Reservation in the State of Colorado approximately four miles from the boundary of the Jicarilla Apache Reservation. The location of the Tribe's reservation and the course of the Navajo River and its tributaries are shown on the map attached hereto as Exhibit "A".

The Navajo River and its tributaries provide substantial flow of surface water on the Tribe's reservation. The Tribe has appropriated water from the Navajo River for domestic, municipal, industrial and agricultural uses and has used the flow of said river for fishing and recreation since the establishment of the reservation on February 11, 1887.

4. The Tribe, in addition to its present impoundments, diversions, and uses of water from the Navajo River and its tributaries, has the right under the doctrine established in the case of *Winters* v. *United States*, 207 U.S. 564 (1908) (Winters' Doctrine), to impound, divert and/or use the waters of the Navajo River and its tributaries as is or may be necessary to satisfy the present and future needs of the

Tribe, including, but not limited to propagation and harvesting of fish and aquatic life, irrigation, recreation, domestic, municipal, and industrial uses. The Tribe claims the right to impound, divert and/or use the waters of the Navajo River and its tributaries including surface and ground waters which were unappropriated on February 11, 1887, which are or will become reasonably necessary to satisfy the present and future needs of the Tribe in fulfillment of the purposes for which the reservation was established.

5. The Defendants other than the United States and other unknown claimants joined herein as Defendants claim the right to impound and divert the waters of the Navajo River and its tributaries for use in the State of New Mexico, which claims are adverse to claims of the Tribe. The Tribe is informed and believes and states on such information and belief, that some of said claims have been abandoned.

6. The United States owns lands in the States of New Mexico and Colorado in the watershed of the Navajo River and its tributaries, administered by the Secretary and various government agencies, for which the United States claims the right to impound and divert the waters of the Navajo River and its tributaries, which claims are adverse to the claims of the Tribe and other defendants hereto. Included in said lands are lands administered by the Bureau of Land Management, lands on which public waterholes and springs are located reserved for public watering purposes, National Forest lands including the San Juan National Forest in Colorado and the Santa Fe and Carson National Forests in New Mexico. The Tribe states that its right to the waters of the Navajo River and its tributaries are prior to the rights of the United States to the use of waters on said lands and other lands for which the United States may claim rights to use said waters.

7. The United States claims the right to impound, divert and use waters of the Navajo River and its tributaries

under the provisions of the Act of June 13, 1962, Public Law 87-483, 76 Stat. 97, 43 U.S.C. 615pp, et. seq., known and hereafter referred to as the San Juan-Chama Project Act. The Commissioner of Reclamation of the United States, acting under the presumed authority of the Secretary, has in fact diverted and continues to divert substantial quantities of water from said rivers for the San Juan-Chama Project, which diversions are adverse to and jeopardize the rights of the Tribe. The rights of the Tribe to the natural flow of the Navajo River and its tributaries are prior to the rights of the United States to divert and appropriate water under the provisions of said Act.

8. The Tribe has at various times requested or demanded of the United States and its agencies that action be taken to protect the Tribe's water rights and that the Secretary and his agencies cease wrongfully diverting water from the Navajo and Little Navajo Rivers in violation of the rights of the Tribe to such waters. A partial list of the resolutions of the Tribal Council of the Tribe, copies of which are in the possession of the United States, exemplifying action taken by the Tribe from time to time, are set forth below:

Resolution	Date	Contents
57-818	February 8, 1957	Resolution requesting the Bureau of Indian Affairs to survey the Jicarilla Apache Reservation to determine the feasible acreage for irrigation from the San Juan-Chama Project and/or water from the Navajo River under the Dulce Project.
58-468	May 5, 1958	Resolution authorizing the Executive Committee of the Tribe to use $4,000 to match federal funds for a survey of water use and needs on the Jicarilla Apache Reservation

Resolution	Date	Contents
69-50	October 4, 1968	Resolution requesting the Solicitor of the Department of the Interior and the Department of Justice to intervene on behalf of the Jicarilla Apache Tribe in litigation adjudicating water rights in the Chama River System.
71-117	March 5, 1971	Resolution requesting that the United States recognize its trust responsibilities and provide water rights specialists and experts to protect the Tribe's water rights, provide independent legal assistance to the Tribe and obtain consent of the governing bodies of Indian tribes prior to the planning for use of water passing through or abutting Indian country.
75-18	July 8, 1974	Resolution stating Tribal opposition to Senate Bill 1119, 92nd Congress, and other legislation authorizing the United States to utilize so-called surplus water from the San Juan River and San Juan-Chama Project without consideration of the needs of the Jicarilla Apache Tribe and other Indian tribes.

Resolution	Date	Contents
75-177	November 20, 1974	Request for a moratorium on additional contracts for appropriation of water in the San Juan River Basin until the actual supply of water is determined and the Jicarilla Apache Tribe and other tribes are guaranteed a full amount of water to which they are entitled.
75-365	June 26, 1975	Request to the United States that the Tribe be provided with funds to protect the Tribe's water rights by legal action, and to take whatever other steps are required to protect such rights.

The Secretary through his agents continues to divert a substantial portion of the waters of the Navajo River to the Chama-Rio Grande Basin and has failed to take adequate steps to protect the Tribe's water rights. The Secretary and the Commissioner of Reclamation are parties defendant in an action in the United States District Court for the District of Colorado, No. 74-M-318, entitled *Schutz* v. *Stamm, et al.*, in which the Tribe is a Plaintiff in Intervention, and in which the actions of the United States in diverting the maximum volume of water from the Navajo and Little Navajo Rivers to the Chama-Rio Grande river systems through the San Juan-Chama Project are challenged by the Tribe. The United States cannot consistently in one action represent the Tribe to protect the Tribe's water rights as trustee of the Tribe's property, and in another action involving the same subject matter, defend itself against the complaint of the Tribe for unlawful diversions of water from the same river system. The Secretary, who is by law the Trustee of the Tribe's property rights, has failed to and in fact is unable to act to protect the Tribe's interests by reason of the conflicting duty of the Secretary to the general public, for and on behalf of the United States, to supply water for various federal reservations, and by reason of his duty to contracting parties who have contracted for water from the Navajo River and its tributaries which has been diverted to the Chama and Rio Grande watersheds under the terms of the San Juan-Chama Project Act.

The Tribe is therefore required and entitled to bring this action on its own behalf.

9. The Tribe is informed and believes, and states on such information and belief that the Secretary is now diverting or will in the next several irrigation seasons divert, water from the Navajo River to the Chama-Rio Grande river system in excess of quantitites that can be used beneficially by parties who have contracted with the Secretary for such water, in violation of Article III (b)(2) and Article XIX (a) of the Upper Colorado River Basin Compact approved by Congress by Act of April 6, 1949, Chapter 48, 63 Stat. 31.

Prior to the diversion of water from the Navajo River to the Chama-Rio Grande river system by the Commissioner of Reclamation under the authority of the Secretary, the Tribe beneficially used the entire natural flow of the Navajo River for fishing, recreation, agriculture, domestic and municipal purposes.

Diversion of water by the San Juan-Chama Project has damaged the Tribe's once prosperous trout fishing industry. Since implementation of said project, the Tribe has been and continues to be unable to maintain its fisheries because of the low flows and high water temperatures resulting from the diversion. As the proximate result of the said diversions, the Tribe has suffered substantial loss of income and recreational benefits from fishing, the sale

of licenses and tourist expenditures related to said fishing industry, and has suffered and will continue to suffer irreparable injury to its water supply, its agriculture and to its fishing industry.

The Tribe is entitled to the restoration of so much of the natural flow of the Navajo River now being diverted as is not required for present beneficial uses in the Chama-Rio Grande river system under the provisions of the Upper Colorado River Compact above cited.

10. Unless the claims of the Tribe in and to the waters of the Navajo River and its tributaries are determined and decreed as against the United States and other claimants in the State of New Mexico, the United States and other claimants will appropriate all of the water of said stream contrary to Article XIX subparagraph (a) of the Upper Colorado River Compact; contrary to Title XIV of the Reclamation Development Act of 1974, enacted October 27, 1974, Public Law 93-493; contrary to the San Juan-Chama Project Act, and otherwise contrary to the Constitution and laws of the United States.

11. The Defendants should be required to specify to the Court in writing within a reasonable time, all of their claims to the right to impound and/or divert waters of said streams for use in the State of New Mexico.

12. In the event there are other claimants to the right to impound, and/or divert waters of the Navajo River and its tributaries for use in the State of New Mexico in addition to those claimants named as Defendants herein, said claimants will be made known to the Court by the Tribe as soon as their names are discovered.

13. Defendants other than the United States and each of them claim rights in and to the use of waters of the Navajo River and its tributaries in the State of New Mexico which rights are adverse to and jeopardize the rights of the Tribe. All users of the aforementioned waters are necessary parties to this action.

WHEREFORE, the Tribe prays:

1. That each and all of the Defendants including those later joined be required to appear before this Court and set forth fully their claims in and to the use of the water of the Navajo River and its tributaries in the State of New Mexico.

2. That the Court determine and decree that the Jicarilla Apache Tribe holds the right to divert and use as much of the water of the Navajo River and its tributaries as is or may be reasonably necessary to satisfy the present and future needs of said Jicarilla Apache Tribe of Indians, including but not limited to propagation and harvesting of fish and aquatic life, domestic, municipal, industrial, and agricultural uses, or otherwise in fulfillment of the purposes for which the Jicarilla Apache Reservation was created, and that said rights to be declared to have a priority date of February 11, 1887. If in the alternative, the Court holds that water rights are held by the United States for the benefit of the Jicarilla Apache Tribe, that the Court order and require the United States to hold said water for the benefit of the Jicarilla Apache Tribe with said priority date.

3. That the Court enter its Order enjoining all diversions to the Chama-Rio Grande river system through the San Juan-Chama Project in excess of quantities that presently can be used beneficially by parties who have contracted with the Secretary for said water.

4. That the Court enter its Order enjoining future uses and diversions of water of the Navajo River and its tri-

butaries except in accordance with the rights and priorities determined by the Court and set forth in its Decree.

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By /s/ Robert J. Nordhaus
Robert J. Nordhaus
Attorneys for Plaintiff

APPENDIX D

IN THE

District Court

IN AND FOR THE COUNTY OF SAN JUAN STATE OF NEW MEXICO

No. 75-184

STATE OF NEW MEXICO, in the relation of S. E. REYNOLDS, State Engineer,

Plaintiff,

v.

UNITED STATES OF AMERICA, CITY OF FARMINGTON, THE ECHO DITCH COMPANY, UTAH INTERNATIONAL, INC. BLOOMFIELD IRRIGATION DISTRICT F. F. MONTOYA, et al.

Defendants.

Complaint

COMES NOW the State of New Mexico, on the relation of S. E. Reynolds, State Engineer, and for its cause of action states:

1. That S. E. Reynolds is the duly appointed State Engineer of the State of New Mexico, charged by statute with the administration and supervision of the public waters of the State.

2. That this action is brought pursuant to Sections 75-4-4 through -8, NMSA, 1953 Comp., and 43 U.S.C. 666(a).

3. That the defendant United States of America and all other defendants herein are claimants to the right to im-

pound, divert and/or use public waters of the San Juan River and its tributaries in the State of New Mexico.

4. That the subject matter of this suit is a statutory adjudication of all known claims, of whatever character, to the right to impound, divert and/or use public waters of the San Juan River Stream System in the State of New Mexico.

5. That the waters of the San Juan River Stream System in the State of New Mexico are public waters of the State of New Mexico and subject to appropriation and adjudication as provided by law, and that the San Juan River Stream System, and the uses therefore in the State of New Mexico, lie principally within San Juan County, New Mexico.

6. That all known claims to the right to use waters of the said stream system in New Mexico were adjudicated in the final decree of the District Court in and for San Juan County, New Mexico in Cause No. 01690, the *Echo Ditch Co., et al.*, v. *The McDermott Ditch Co., et al.*, with the exception of the claims of the United States of America on its own behalf and on behalf of its wards, which claims have never been determined and decreed by any court.

7. That the United States of America is known to claim various and substantial rights to impound and/or divert and use public waters of the San Juan River Stream System on its own behalf and on behalf of its wards, to wit, the Jicarilla Apache Tribe of Indians, the Navajo Tribe of Indians and the Ute Mountain Tribe of Indians, under the Constitution and laws of the United States as well as under the Constitution and laws of the State of New Mexico.

8. That unless the claims of the United States of America on its own behalf and on behalf of its wards to rights in and to the waters of the San Juan River Stream System in New Mexico are determined and decreed as against the State of New Mexico and as against all other claimants of

right to use the waters of the said stream system in New Mexico, the State Engineer will be unable to discharge his statutory duty to administer and supervise the waters of the San Juan River Stream System in New Mexico in accordance with law.

9. That the adjudication of all rights to the use of the waters of the San Juan River Stream System in the State of New Mexico, including those previously decreed in the said Cause No. 01690 as they may now exist, relative to the State of New Mexico, to the United States of America, and *inter sese*, is necessary in order to make possible the lawful and orderly administration of all of the public waters of the said stream system in New Mexico.

10. That this Court has jurisdiction over the claims of the United States of America on its own behalf and on behalf of its Indian wards, in and to the waters of the said stream system whether such claims arise under the Constitution and laws of the United States or under the Constitution and laws of the State of New Mexico, and over the United States of America as a party defendant in this action, pursuant to 43 U.S.C. 666(a), known as the McCarran Amendment.

11. That a hydrographic survey describing all known uses of the waters of the said stream system, except those of the defendants United States of America and its wards, has heretofore been prepared by the State Engineer of the State of New Mexico and submitted to the Court in the said Cause No. 01690, a copy of which hydrographic survey and report has been filed in this cause; when and as supplemental hydrographic survey reports may be required they will be prepared and filed herein by the Plaintiff.

12. That the defendant, United States of America should be required to specify to the Court in writing, within a reasonable time, all and several of its claims to the

right to impound, divert and/or use the waters of the said stream system in New Mexico for any purpose.

13. That all claimants to the right to impound, divert and/or use public waters of the said stream system in the State of New Mexico will be made known to the Court by the Plaintiff as soon as their names can be discovered, and the said claimants should thereafter be ordered joined as additional parties defendant herein.

WHEREFORE, Plaintiff respectfully prays:

1. That this honorable Court appoint its master to take evidence and make his report on all questions of fact and law, which report shall determine all general and specific issues of fact properly arising in this action, and make such findings of fact and conclusions of law as may appear necessary and proper to him.

2. That the Defendants, and each of them, be required to appear before the court and describe fully and in detail what rights, if any, they claim to the use of the water in the said San Juan River Stream System, and more specifically state:

a. When said water right was initiated.

b. If a water right for irrigation is claimed, the lands to which it is appurtenant.

c. Source of water.

d. Purpose for which it is used.

e. The amount of water necessary for the beneficial use for which it was appropriated.

f. Such other matters as may be necessary to define a particular right and its priority.

3. That the court determine and define the water rights of each of the several defendants and enter its decree stating:

a. The water rights adjudged each party.

b. The source, priority, amount, purpose, periods, and place of use of each right.

c. The specific tracts of land to which the water right for irrigation is appurtenant.

d. Such other matters as may be necessary to define a particular right and its priority.

4. That the Court enter its order enjoining all illegal use of surface and underground waters of the San Juan River Stream System and where necessary require measuring devices at points of diversion in this stream system.

5. That the Court name additional parties from time to time as it appears necessary to determine and adjudicate all the water rights of the San Juan River Stream System in New Mexico.

6. That the court enter such preliminary, interlocutory, and final orders as are necessary to a final determination and adjudication of all water rights of the San Juan River Stream System in New Mexico.

/s/ Paul L. Bloom
PAUL L. BLOOM

Supreme Court, U. S.
FILED
NOV 23 1979
MICHAEL RODAK, JR., CLERK

No. 79-475

In the Supreme Court of the United States

OCTOBER TERM, 1979

JICARILLA APACHE TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
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Assistant Attorney General

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Constitutional and statutory provisions involved 2

Statement 2

Discussion 5

Conclusion 11

CITATIONS

Cases:

Bryan v. *Itasca County*, 426 U.S. 373 7

Colorado River Water Conversation District v. *United States*, 424 U.S. 800 ..... 1, 4, 5, 6, 8, 9

Kennerly v. *District Court*, 400 U.S. 423 6

Minnesota v. *United States*, 305 U.S. 382 6

Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463 7

Washington v. *Fishing Vessel Ass'n*, No. 77-983 (July 2, 1979) 8

Washington v. *Yakima Indian Nation*, 439 U.S. 463 6

Wilson v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979) 8

Page

Constitution and statutes:

New Mexico Constitution, §2 4

McCarran Amendment,
43 U.S.C. 666 ..... 2, 3, 4, 5, 6, 7, 8

New Mexico Enabling Act of June 20, 1910,
ch. 310, 36 Stat. 557 2

Section 2, 36 Stat. 558-560 4

Pub. L. No. 83-280, Section 6, 67
Stat. 590 6

Pub. L. No. 90-284, Section 404, 82
Stat. 79, 25 U.S.C. 1324 6

28 U.S.C. 1345 5

28 U.S.C. 1360(b) 6, 7

28 U.S.C. 1362 7

43 U.S.C. 666 3

N.M. Stat. Ann §72-4-17 (1978 Comp.),
previously §75-4-6 (1953 Comp.) 3

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-42a) is reported at 601 F. 2d 1116. The opinion of the district court (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1979. The petition for certiorari was filed on September 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court's holding in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), that a federal district court properly may dismiss a

case brought to determine the water rights of an Indian tribe in favor of a pending state stream adjudication, should be clarified, qualified or reconsidered.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the New Mexico Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, the New Mexico Constitution, and the McCarran Amendment, 43 U.S.C. 666, are set out in the petition at 3-5.

STATEMENT

On December 12, 1975, the Jicarilla Apache Tribe filed a complaint in the United States District Court for the District of New Mexico to adjudicate the water rights in that State on the Navajo River and its tributaries, and also for a declaration that the Secretary of the Interior was improperly diverting water from the Navajo River through the San Juan-Chama Reclamation Project (Pet. App. 43a-52a). Named as defendants were the United States, the Secretary of the Interior, and certain private parties who used water from the Navajo River in New Mexico. The claims against the private parties were subsequently settled, leaving only claims against the federal defendants in the case at the present time.

On February 15, 1977, the United States filed an answer in which it admitted the jurisdiction of the federal district court. On April 13, 1977, the State of New Mexico, as amicus curiae, filed a suggestion of want of jurisdiction. After a hearing, the district court entered an order on July 19, 1977, dismissing the complaint for lack of jurisdiction (Pet. App. 1a-2a).

The district court's order took note of *State of New Mexico ex rel. Reynolds* v. *United States*, No. 75-184 (Dist. Ct. San Juan County, filed March 13, 1975), a

general stream adjudication filed by the State of New Mexico in state court on March 13, 1975, to determine rights to the use of water in New Mexico from the San Juan River and its tributaries, including the Navajo River. The State's complaint in *Reynolds* alleged (Pet. App. 54a) that a prior state court adjudication had already settled all known claims to waters of the San Juan River System, except the claims of the United States and the Jicarilla Apache, Ute Mountain Ute, and Navajo Tribes.[1] From the face of the complaint, the purpose of the state court action therefore appeared to be to adjudicate the water rights of the United States and the three tribes.

The district court concluded that the United States was properly named as a defendant in state court in *Reynolds* under the authority of the McCarran Amendment, 43 U.S.C. 666, on its own behalf and on behalf of the three Indian tribes. Pet. App. 1a. In dismissing the complaint, the district court simply noticed that the state court proceeding had been filed several months earlier and that a New Mexico state statute, N.M. Stat. Ann. §75-4-6 (1953 Comp.),[2] gave exclusive jurisdiction to adjudicate water rights to "[t]he Court in which any suit involving the adjudication of water rights may be properly brought." Pet. App. 2a. The district court therefore dismissed the complaint for lack of jurisdiction over the subject matter.

On appeal to the Tenth Circuit, the Tribe and the United States argued that New Mexico's courts did not have jurisdiction to adjudicate Indian water rights because

---

[1]The United States attempted to remove the state court case to federal court, and there to have it dismissed for lack of jurisdiction, but on each occasion the federal district court remanded the case.

[2]This statute is now codified as N.M. Stat. Ann. §72-4-17 (1978 Comp.).

of a provision in Section 2 of the Enabling Act admitting New Mexico to the Union, 36 Stat. 558-560, repeated in Section 2 of the New Mexico Constitution, by which the State disclaimed jurisdiction over Indian tribes and their property. Alternatively, they argued that even if the State had jurisdiction to adjudicate waters held by the United States for the benefit of Indians, the district court had erred in concluding that the New Mexico statute could deprive a federal district court of subject matter jurisdiction granted by federal statute and that the district court had improperly failed to balance the considerations set out in *Colorado River, supra*, for determining when a federal district court should dismiss a water adjudication in favor of a pending state case. The State, as amicus curiae, filed a brief urging affirmance of the dismissal by the district court.

On March 12, 1979, the court of appeals entered an order affirming the district court's dismissal of the water rights adjudication.[3] The court of appeals found that the state court in *Reynolds* had jurisdiction to adjudicate the water rights of the Tribe, notwithstanding the disclaimer clauses of the State's Constitution and Enabling Act. In the court of appeals' view (Pet. App. 33a-36a), the authorization this Court found (see *Colorado River, supra*, 424 U.S. at 809-813) in the McCarran Amendment for state courts to adjudicate water rights held by the United States for the benefit of Indian tribes implicitly repealed any prohibitions in a state's Enabling Act to the extent necessary to permit that adjudication.

[3]The court of appeals remanded the action for a determination on the San Juan-Chama Project issue. There is general agreement that the district court has jurisdiction to determine that issue.

The court of appeals did not consider whether the district court acted properly in mechanically dismissing the Tribe's action in reliance on the New Mexico statute it read to grant exclusive jurisdiction to the State court. There was likewise no mention of the district court's failure to weigh the factors set out in *Colorado River* for determining whether a federal court should dismiss in favor of a pending state water rights adjudication; nor did the court of appeals discuss those criteria itself.

DISCUSSION

In *Colorado River, supra*, the Court held (424 U.S. at 809-813) that the McCarran Amendment waives the sovereign immunity of the United States in respect of water rights it holds for the benefit of Indian tribes and also that the Amendment permits state courts to adjudicate those rights. At the same time, the Court recognized that the federal courts may adjudicate tribal water rights in actions brought under 28 U.S.C. 1345, and announced certain criteria for deciding whether a federal court should retain jurisdiction in a water rights case when a state-court action addressing the same rights is pending, 424 U.S. at 817-821. In application, however, the decision has not fullfilled the hope that it would eliminate duplicative litigation and provide a harmonious accommodation of competing interests.

On the contrary, because of the special importance of the forum in this context, the actual consequence of *Colorado River* has been to promote an unseemly race to the courthouse, followed by often prolonged and intense jurisdictional skirmishing, pursued both in state and federal courts. The upshot is a waste of judicial resources and an increased risk of tension between the parties and

the two court systems. In these circumstances, we urge the Court to take the present opportunity to clarify, qualify, or perhaps reconsider, its *Colorado River* decision.

1. One source of the difficulties encountered in applying it is the apparently anomalous character of the *Colorado River* holding that the McCarran Amendment, which does not mention Indians or State courts, must nevertheless be read as waiving the sovereign immunity of the United States so as to permit the adjudication of Indian water rights in the courts of the State—notwithstanding the seemingly contrary directive of Public Law 280 with specific reference to tribal water rights, 28 U.S.C. 1360(b), and the opposite result when Indian land rights are involved, *Minnesota* v. *United States*, 305 U.S. 382 (1939). This has led some to conclude—wrongly, as we suppose—that all the usual rules of construction applicable to legislation touching vital Indian interests are inoperative in water rights cases.

We confront one aspect of that question in deciding whether the McCarran Amendment overrides the Indian disclaimer clauses of Enabling Acts and State Constitutions governing several Western states, including New Mexico. The continuing force of those provisions as inhibiting the jurisdiction of State courts was recognized by Public Law 280 in 1953 and the Indian Civil Rights Act in 1968, when Congress authorized the affected States to overcome the obstacle in some circumstances. Pub. L. No. 83-280, Section 6, 67 Stat. 590; Pub. L. No. 90-284, Section 404, 82 Stat. 79, 25 U.S.C. 1324. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 481 (1979). Presumably, the disclaimer clauses remained effective insofar as the States failed to act timely (see *Kennerly* v. *District Court*, 400 U.S. 423, 427 (1971)), or in areas

exempt from Public Law 280, such as water rights. 28 U.S.C. 1360(b); cf. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

So, also, it remains unsettled whether, under *Colorado River*, the McCarran Amendment overrides the right of Indian tribes, granted by 28 U.S.C. 1362, to pursue their claims in federal court independently of the United States. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 472-475 (1976). That is the result if, as here, the Tribe's suit is dismissed in favor of a pending State court action where it is only indirectly represented by the United States. We assume an Indian Tribe, enjoying sovereign immunity and unmentioned in the McCarran Amendment, cannot be made an involuntary party in the State court. It may be, moreover, that the State plaintiff can block its attempt to intervene as a separate party—thereby creating a very awkward situation when, as alleged here, the tribe's claim is, in some respects, adverse to other federal claims. And, even if free to participate in the state court proceedings, the tribe is effectively deprived of both its sovereign immunity and its right to a federal forum.

These problems—squarely presented by this case—create a serious dilemma. It would be extraordinary to read into the seemingly innocuous words of the McCarran Amendment an intent to nullify the express protections Congress provided for Indian rights by both earlier and later enactments—and to do so in respect of access to water, the most vital resource of many of the subsisting Indian tribes. Yet, it seems to us equally difficult to ascribe to Congress an intent to preserve the important guarantee of a federal forum for tribes in "disclaimer" states, but not elsewhere, or when the tribe asserts water rights in its own name, but not when the United States advances the tribe's rights. The answer may lie in a re-

examination of the basic holding of *Colorado River* that the McCarran Amendment empowers state courts to adjudicate Indian water rights.

2. It may be, however, that most of the practical difficulties would be avoided if it were made clear that, although state and federal courts have concurrent jurisdiction, the *preferred* forum for the adjudication of Indian water rights is the federal district court. The McCarran Amendment, insofar as it permits state courts to determine interests held by the national government, is of course an exception to the normal rule that the United States is entitled to insist on suing and being sued in its own courts. The exception ought not be extended beyond the necessities which created it. All the more so when the rights asserted by the government are those of Indian tribes, for, unfortunately, it remains true that State courts are often inhospitable to the claims of Indian tribes under federal law. See *Washington* v. *Fishing Vessel Ass'n*, No. 77-983 (July 2, 1979), slip op. 13-15. See, also, *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 18. Special circumstances may require submitting Indian water rights to State court adjudication and, in some cases, there may be no reason to seek a federal forum even though available. But, in our view, the jurisdiction of the federal court, if timely invoked, ought normally to preempt a competing state court proceeding when Indian water rights are at stake.

This Court's decision in *Colorado River* may announce the rule we suggest. But, especially in light of the dissents (424 U.S. at 821-827), that is not generally understood. At the least, it is obvious that the lower courts have not all so read the case. Thus, here, the district court dismissed the tribe's suit on the sole ground that there was a pending state court action covering the same water claims, which,

under a state statute, was the exclusive forum. Pet. App. 2a. The court did not consider whether it ought to entertain the case, although there were, as it happens, special reasons for doing so.[4] Nor did the court of appeals purport to determine whether there were practical obstacles to the proposed federal court adjudication. Pet. App. 41a.[5] No doubt, the courts in this case failed to give the question that "carefully considered judgment" mandated by *Colorado River* (424 U.S. at 818). But, on the other hand, it may be that this Court could usefully provide additional guidance on the question.

3. At the least, we submit the Court should clarify its ruling. As things are, suits filed to adjudicate Indian water rights are often delayed while the parties maneuver to have the case heard in their preferred forum. Where Indian tribes bring such actions in federal district court,

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[4]As we have noted:

(1) The State court complaint stated that all non-federal claims had been previously adjudicated (see Pet. App. 54a);

(2) The State court action had been filed only nine months before the federal suit and no proceedings other than jurisdictional notices had been undertaken (see Pet. App. 4a-5a);

(3) Both the United States and the Tribe asserted that there existed a conflict between the tribal water claims and those asserted by the government for other uses (see Pet. App. 5a-10a, 45a);

(4) The claims of all claimants other than the United States and the Tribe in the federal suit were amicably settled (Pet. 6 n.1).

[5]While reversing as to the San Juan-Chama Project diversion dispute between the Tribe and the Secretary (Pet. App. 41a-42a), the court of appeals, after rejecting the "disclaimer clause" argument (Pet. App. 20a-41a), merely affirmed the district court's dismissal of the complaint for a general water rights adjudication in a single conclusory paragraph, reciting only "the fact that an identical action had been previously filed in the state court." Pet. App. 41a.

the non-Indian parties move for their dismissal in favor of a pending state case.[6] Similarly, where non-Indians apply to state forums to adjudicate their rights, the Indians remove the action to federal district court.[7] Moreover,

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[6]For example, see the following water rights cases, all filed in the United States District Court for the District of Arizona: *Salt River Pima-Maricopa Indian Community* v. *Arizona*, Civ. No. 79-185 PHX VAC; *San Carlos Apache Tribe* v. *Arizona*, Civ. No. 79-186 PHX VAC; *Payson Community of Yavapai Indians* v. *Arizona*, Civ. No. 79-187 PHX VAC (consolidated, filed March 7, 1979); *San Carlos Apache Tribe* v. *Arizona*, Civ. No. 79-269 PHX VAC (filed April 16, 1979); *Fort McDowell Mohave-Apache Indian Community* v. *Salt River Valley Water Users Association*, Civ. No. 79-267 PHX VAC (filed April 13, 1979); *Navajo Nation* v. *United States*, Civ. No. 79-276 PCT-VAC (filed April 17, 1979). In each case defendants have filed motions to dismiss, based on pending state actions. The motions have not been acted upon.

Likewise, in *United States* v. *Tongue River Water Users Association*, Civ. No. 75-20-BLG (D. Mont. 1974) and *United States* v. *Big Horn Low Line Canal*, Civ. No. 75-34-BLG (D. Mont., filed April 17, 1975), which seek adjudication of Indian water rights, motions to dismiss, based on pending state actions, were heard on September 10, 1976, and have not yet been decided.

[7]See *In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam and Its Tributaries Including Tonto Creek, Excluding the Verde River and Its Tributaries, Arizona State Land Department* (filed April 26, 1974). The White Mountain Apache Tribe, the Gila River Indian Community, and the Salt River Pima-Maricopa Indian Community, separately petitioned to remove the action to the United States District Court for the District of Arizona, Nos. 79-182 PHX VAC, 79-183 PHX VAC and 79-184 PHX VAC. Motions to remand to the state forum were argued September 25, 1979, and have not yet been decided.

Similarly, in *State of Washington* v. *Acquavella*, No. 77-2 C 1484-5 (Super. Ct. Yakima Cty., filed October 25, 1977), the State brought a general stream adjudication of the Yakima River, including the rights of the Yakima Tribe. The United States removed to federal court, which subsequently remanded the action to the state court. This pattern was also followed in *In re the General Adjudication of All*

some actions have been filed merely in order to obtain a jurisdictional foothold, causing many private water users to be served in a judicial proceeding that might otherwise have been avoided through negotiation.[8]

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted.

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NOVEMBER 1979

Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Civ. No. 4993 (Dis. Ct. Washakie County, Wyoming), which seeks to adjudicate the rights of all people in the Big Horn River Basin and its tributaries including the tribes of the Wind River Reservation.

[8]See, *e.g.*, *United States* v. *Ames Ranch, Inc.*, Civ. No. 79-22-GF (D. Mont. 1979); *United States* v. *Aageson*, Civ. No. 79-21-GF (D. Mont. 1979); *United States* v. *Aasheim*, Civ. No. 79-40-BLG (D. Mont. 1979); *United States* v. *Abell*, Civ. No. 79-33-M (D. Mont. 1979).

DOJ-1979-11

FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1979

No. 79-475

JICARILLA APACHE TRIBE, *Petitioners,*

v.

UNITED STATES OF AMERICA, et al., *Respondents.*
STATE OF NEW MEXICO, *Amicus Curiae.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF COLORADO IN OPPOSITION

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November 16, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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---

AMICUS CURIAE BRIEF OF THE STATE OF COLORADO IN OPPOSITION

The State of Colorado, and Colorado agencies which participated in this Court in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976), hereby join with the State of New Mexico in opposition to certiorari herein for the reason that the

primary issue framed by the petition of state court jurisdiction was declared and concluded by this Court in the case above cited.

Respectfully submitted,

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Supreme Court, U. S.
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October Term, 1979

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Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

STATE OF NEW MEXICO,
Amicus Curiae.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO IN OPPOSITION

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November 8, 1979

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW/JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF THE CASE. 2

REASONS FOR DENYING THE WRIT

I. The Issue Has Already Been Decided By This Court 5

II. The Holding in *Colorado River* Is Correct and Should Stand Undisturbed 13

CONCLUSION. 16

APPENDIX A (Map). . . . . Inside Back Cover

TABLE OF AUTHORITIES

Cases: Page

Avondale Irrigation Dist. v. North Idaho Properties
96 Idaho 1, 523 P.2d 818 (1974). 10

Colorado River Water Conservation District v. U. S.
424 U.S. 800 (1976) . 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

Donnelly v. U. S.
228 U.S. 243 (1913) 8

Dugan v. Rank
372 U.S. 609 (1963) 10, 14

El Paso & R.I. Ry. Co. v. District Court of the Fifth Judicial District
36 N.M. 94, 8 P.2d 1064 (1931). 14

Hazard v. Reservoir Co.
87 Colo. 364, 287 P. 854 14

Lone Wolf v. Hitchcock
187 U.S. 553 (1903) 10

Louden Canal Co. v. Handy Ditch Co.
22 Colo. 102, 43 P. 535 14

McClanahan v. Arizona Tax Commission
411 U.S. 164 (1973) 11

Miller v. Jennings
243 F.2d 157 (5th Cir. 1957), *cert. denied,*
355 U.S. 827 (1957) 14

Mimbres Valley Irrigation Co. v. Salopek
90 N.M. 410, 564 P.2d 615 (1977) 11

Owens v. Snider, et al.,
52 Okl. 772, 153 P. 833 14

Pacific Live Stock v. Lewis
241 U.S. 440 14

Pueblo of Isleta v. Tondre
18 N.M. 388, 137 P. 86 14

Page

Snow v. Abalos
18 N.M. 681, 140 P. 1044 14

State of New Mexico ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America
570 F.2d 1364 (10th Cir. 1978) 9

State of New Mexico ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America
No. 9780 – Civil (U.S.D.C.N.M.) 11

State of New Mexico ex rel. S. E. Reynolds, State Engineer v. U.S.A., et al.
No. 75-184, New Mexico District Court, for San Juan County 2, 3

Turner v. United States
248 U.S. 354 (1919) 12

U. S. v. Kagama
118 U.S. 375 (1886) 8

United States v. New Mexico
____U.S.____, 98 S.Ct. 3012 (1978) 11

United States v. District Court in and for Eagle County
401 U.S. 520 (1971) 10, 11

Van Brocklin v. State of Tennessee
117 U.S. 151 (1886) 7, 8

Weiland v. Reorganized Catlin Consol. Canal Co.
61 Colo. 125, 156 P. 596. 14

Whyte v. Dist. Ct. of Montezuma County
140 Colo. 344, 346 P.2d 1012 (1959)
cert. denied, 363 U.S. 829 (1960) 7, 8

Worcester v. Georgia
31 U.S. (6 Pet.) 515 (1832). 7

(cont.)

Statutes & Rules: Page

36 Stat. 557 (New Mexico Enabling Act). 2, 5, 8, 9
67 Stat. 588 (Public Law 83-280) 11
28 U.S.C. 1362. 11
43 U.S.C. 666 (McCarran Amendment)
. . . . . 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16
Rule 26, F.R.C.P. 4

New Mexico Constitution, Statutes & Rules:

New Mexico Constitution, Article XXI, Sec. 2 . . 2, 5, 6, 8, 9
Sec. 72-4-15, N.M.S.A. 1978 2
Rule 26, NMRCP. 4

Treatises:

3 Kinney on Irrigation and Water Rights (2d Ed.),
Sec. 1568. 14

Legislative History:

S. Rep. No. 755, 82d cong., 1st Sess. (1951) 13, 15

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-475

JICARILLA APACHE TRIBE,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

STATE OF NEW MEXICO,
Amicus Curiae.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO IN OPPOSITION

New Mexico's Statement of the Case will show an absence of genuine controversy between the parties to this Petition for Writ of Certiorari. We respectfully suggest, therefore, that this brief – being the only one in opposition – may be as useful as the parties' briefs in determining whether the writ should issue.

OPINIONS BELOW/JURISDICTION

We do not disagree with the Jicarillas' statements pursuant to Rules 40(1) (a) and (b) of the Rules of the Supreme Court.

QUESTION PRESENTED

The Jicarillas' list of questions presented is deceptive. Instead of the four questions set forth in the Petition, there is properly one question presented: Is the act of Congress which gives concurrent federal and state court jurisdiction to adjudicate federally owned reserved water rights held on behalf of Indians applicable to the ten western states whose enabling acts and constitutions recite that Indian reservation lands "shall be and remain under the absolute jurisdiction and control of the Congress of the United States?"

STATEMENT OF THE CASE

The Jicarillas' Statement of the Case is misleading in three important respects: 1) it does not inform the Court of the conflict of proceedings which frames the jurisdictional issue; 2) it distorts the nature and purpose of the pending adjudication in state court; and 3) it misstates the holding of the Tenth Circuit.

1) Conflict of proceedings – On March 13, 1975, the State of New Mexico filed in New Mexico District Court for the County of San Juan a general water rights adjudication pursuant to §72-4-15 et seq. N.M.S.A. 1978 for the determination of all of the rights to the use of the surface and underground waters of the San Juan River stream system, including the Navajo River and its tributaries. *State of New Mexico ex rel. S. E. Reynolds, State Engineer v. United States of America, et al.,*

No. 75-184. Pursuant to the McCarran Amendment, 43 U.S.C. §666, the United States was named as a party defendant in its own behalf and on behalf of three dependent Indian tribes, including the Jicarilla Apache Tribe, who enjoy the use of federally-owned Indian reservation lands within the stream system in New Mexico.

Following an unsuccessful attempt to obtain an adjudication of their rights in federal district court in Colorado, two unsuccessful attempts by the United States to remove the San Juan action to federal district court in Albuquerque, two remands, and three unsuccessful motions to dismiss, the Jicarillas filed the suit below in federal district court in New Mexico, naming the United States as a party defendant under the McCarran Amendment. In its Answer the United States conveniently admitted the Jicarillas' allegation of jurisdiction.

In light of the eighth interruption in the pending state court adjudication, New Mexico appeared *amicus curiae* in the Jicarillas' federal court proceeding and filed a Suggestion of Want of Jurisdiction, urging the district court to dismiss the Tribe's attempt to obtain a separate adjudication of the United States' claims on its behalf. The court dismissed the action *sua sponte* on July 19, 1977, more than two years after New Mexico had initially undertaken a statutory adjudication in state court of the rights in question.

The case was appealed against the United States, and the State of New Mexico again appeared in the Tenth Circuit as *amicus curiae,* both by brief and oral argument. The Tenth Circuit affirmed the district court's dismissal. New Mexico has never been a party to these proceedings, but because of the lack of case or controversy between the Jicarillas and the United States, we have been forced to enter our appearance *amicus* at every level, including this appearance to oppose the Petition for Writ of Certiorari.

2) The purpose and value of the state court adjudication – In their Statement of the Case the Jicarillas declare: "At this writing there have not been any proceedings in the state court suit other than hearings on motions to intervene and to dismiss and the removal petition. There has not been any discovery and the court has not entered any pretrial orders." (Petition, p. 8). The statement is untrue. Since the filing of the state court adjudication on March 13, 1975, 1,594 parties defendant have been added. Without court order pursuant to Rule 26 of the Rules of Civil Procedure, but by means of some of the techniques described therein, the State of New Mexico has discovered and surveyed the history of diversion and application to beneficial use made by nearly all of the named defendants. On the basis of the discovery completed by the plaintiff since 1975, it can be expected that 95% of the individual water rights will be stipulated and decreed.[1] The statement that there has been no discovery and the suggestion that the state court action was filed to adjudicate only federal claims are absolutely false.[2]

1. There has been no discovery to date of the reserved right claims of the United States on behalf of the Jicarilla Apache Tribe because the Tribe requested counsel for the State of New Mexico to postpone discovery until their own contractors had compiled requisite information. Adjudication of the federal claims has also been delayed because of the protracted jurisdictional debate. Similarly, in 13 other general adjudications pending in New Mexico for as long as 14 years, the federal claims have not yet been determined because of the persistence of the United States in finding some jurisdictional basis upon which to interrupt the litigation.

2. In 1948 the rights of approximately 1100 non-federal claimants to San Juan waters were determined in the First Judicial District of New Mexico, within and for San Juan County. The hydrologically related groundwater rights were not adjudicated, and the State of New Mexico was not a party. Because of the rapid development of uranium and coal in northwestern New Mexico, however, the State Engineer determined

3) The Tenth Circuit holding – Finally, the Jicarillas state that the Tenth Circuit "held that the Indian disclaimer provisions in New Mexico's Enabling Act and Constitution do not preclude the adjudication of Indian water rights in New Mexico's courts because the disclaimer is limited to matters of a proprietary, as opposed to governmental nature." (*Id.*, p.9). While that was a conclusion of the Tenth Circuit, it did not so hold. It held that in enacting the McCarran Amendment the Congress *exercised* its absolute jurisdiction and control over federal Indian reservations. The Circuit Court said that the state's adjudicatory jurisdiction over the United States' claims on behalf of the Jicarilla Apache Tribe in no way conflicts with its disclaimer provisions, but, on the contrary, complements them. (Petition, App. 30a, 32a-33a). Accordingly, if a writ of certiorari were to issue to the Tenth Circuit it would not facilitate a review of whether the disclaimer provisions are proprietary or governmental. It would facilitate review of whether the McCarran Amendment was an exercise of Congress' authority over Indian reservations, which has already been decided by this Court in precisely the same way as the Tenth Circuit decided it below.

REASONS FOR DENYING THE WRIT

POINT I: THE ISSUE HAS ALREADY BEEN DECIDED BY THIS COURT.

In *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), the Court held that the McCarran

2. cont.
in 1975 that a comprehensive adjudication of the numerous conflicting claims to water should be undertaken, a decision which resulted in the filing of the pending state court adjudication. Unlike the earlier action, the pending action is a statutory adjudication involving all of the interrelated claims to San Juan waters.

Amendment authorizes state court jurisdiction to adjudicate federally reserved Indian water rights.[3] Therefore, at the heart of the Jicarillas' Petition is the argument that this case is distinguishable. As will be discussed point by point, however, the holding in *Colorado River* remains controlling.

1. The main thrust of the Jicarillas' argument is that New Mexico's disclaimer clauses in her enabling act and constitution preclude state court jurisdiction over Indian reservations. A review of the wording of the disclaimer dispels this contention. In relevant part it provides that the inhabitants of New Mexico agree and declare:

> . . .that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. (See, Petition, pp. 3-4).

The only obligation New Mexico assumed in this disclaimer lies in her acknowledgment of Congress' plenary control over Indian reservations. In 1952 Congress exercised this control by enacting the McCarran Amendment allowing the adjudication of federal reserved rights held on behalf of Indians in either state or federal courts. Accordingly, New Mexico did not violate the terms of her enabling act or constitution by seeking to adjudicate the interrelated rights to the use of San Juan waters in state court. On the contrary, New Mexico exercised jurisdiction in compliance with the terms of her disclaimer, which is

3. The Jicarillas emphasize the dissenting opinion. The dissent, however, concurs in the majority holding that under the McCarran Amendment the state court had jurisdiction over reservation water rights. (*Id.* at 827). Also, in *Colorado River* Justice Stewart was concerned because the United States had been named as a McCarran defendant in the state court proceedings *after* the federal court action was filed. In this case the United States was named in the state adjudication nine months *before* the Jicarillas sought an independent federal court adjudication.

exactly the Tenth Circuit's holding. (Petition, App. 30a, 32a-33a).

There is a second reason that the existence of New Mexico's disclaimer does not provide a basis upon which to distinguish the holding in *Colorado River.* The disclaimer is an acknowledgment that Congress has plenary power over Indian tribes; it is declaratory in nature instead of conferring some right or power upon the United States. *Van Brocklin v. State of Tennessee,* 117 U.S. 151, 163-169 (1886). Legally, the same mandate is imposed on all fifty states, disclaimer and non-disclaimer states alike, by the Constitution of the United States. Commencing with *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), this Court has decided a multitude of cases which so hold.[4] Historically, the states have been permitted to exercise control over Indians only when, absent governing acts of Congress, the state action has not interfered with tribal government. Here, there is a governing act of Congress. As was held in *Whyte v. District Court of Montezuma County,* 140 Colo. 344, 346 P.2d 1012, 1015 (1959), *cert. den.* 363 U.S. 829 (1960), "(t)he test is not whether a state has disclaimed jurisdiction, but whether Congress has authorized such a jurisdiction within the state." That the McCarran Amendment authorizes the adjudication of federal reserved rights for Indians in state courts has been squarely determined by this Court.

4. In *Worcester,* Chief Justice Marshall wrote:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. (*Id.* at 561).

This Court has held that public land and taxation disclaimers in state constitutions are legally unnecessary because the Constitution precludes the state action disclaimed. *Van Brocklin, supra* at 168. For the same reason, Indian disclaimer clauses are unnecessary; they are "not the foundation of the exemption [from state jurisdiction], but [exist] . . .only from abundant caution." *Id.* at 171. Consequently, quite aside from the fact that the McCarran Amendment was an expression of Congress' authority over Indians, the existence of New Mexico's disclaimers provide no basis upon which to distinguish the Court's holding in *Colorado River.*

Lastly, it should be pointed out that although the Jicarillas make much of the existence of New Mexico's disclaimer clause to distinguish this case from *Colorado River*, the identical disclaimer argument was presented in that case without success.[5]

2. The Jicarillas next assert that the Tenth Circuit erred by holding that New Mexico's disclaimer clause was repealed by

5. See, Point IIB3 (pp. 23-26) of the Amici Curiae Brief for the Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe, Mescalero Apache Tribe, Agua Caliente Band of Mission Indians, Colorado River Indian Tribes, Hualapai Tribe, Gila River Indian Community, Shoshone-Bannock Tribes of the Fort Hall Reservation, Burns Paiute Indian Tribe, Devils Lake Sioux Tribe, Assiniboine and Gros Ventre Tribes of the Fort Belknap Reservation, Pueblo of Zuni, Pueblo of Santo Domingo and National Tribal Chairmen's Association.

When the argument was made in *Colorado River,* the *amici curiae* contended that the special wording of Colorado's disclaimer clause made no material difference to the substantive rights of reservation Indians: ". . . [T]his Court and the Colorado Supreme Court have held that the form, or even the absence, of Indian jurisdictional disclaimer provisions makes no material difference so far as the exercise of state jurisdiction is concerned. *U. S. v. Kagama,* 118 U.S. 375 (1886), *Donnelly v. U. S.,* 228 U.S. 243, 270-272 (1913); *Whyte v. Dist. Ct. of Montezuma County,* 140 Colo. 344, 346 P.2d 1012 (1959), *cert. denied,* 363 U.S. 829 (1960)." (*Id.* at 24, n. 20).

implication.[6] (Petition, p. 17). However, the argument and the line of cases cited in support thereof are irrelevant; the Tenth Circuit did not rule on the basis of repeal by implication. To the contrary, it held that the McCarran Amendment and the disclaimer are compatible and that New Mexico was proceeding to exercise jurisdiction in compliance with the authority reposed in Congress and expressed in McCarran. (Petition, App. 32a-33a). An attack on a holding which the Tenth Circuit did not make does not warrant certiorari.[7]

3. In their point no. 3 the Jicarillas seek the reversal of *Colorado River* upon the unsubstantiated assertion that the decision has caused "much unnecessary as well as duplicative litigation in both the state and federal courts. . . ." We do not agree with the Jicarillas' assertion, but in any event, their complaint lies

6. As part of the argument the Jicarillas state that the McCarran Amendment does not repeal the disclaimer nor confer state court jurisdiction because it does not mention "Indians," "Indian water rights," or "state courts." (Petition, pp. 14, 15). This point was expressly disposed of in *Colorado River* when the Court held that authority to sue Indian tribes may be implied. *Id.* at 812.

7. The Jicarillas also argue that notwithstanding their view that the McCarran Amendment and disclaimer provisions found in most western state constitutions are irreconcilable, "(e)ffect can be given to both by holding that in the disclaimer states the adjudication of Indian water rights must take place in the federal courts. . . ." (Petition, p. 16). This could not be done, of course, unless the rights of all of the non-Indian claimants in a given stream system were also adjudicated in federal court, which is not a burden the federal district courts could reasonably assume. More importantly, to require a federal forum would effectively terminate the western states' on-going efforts to adjudicate water rights for the simple reason that only the Indians or the United States could properly initiate an adjudication. If a state filed suit in federal district court there would be no federal question jurisdiction. See, *State of New Mexico ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America,* 570 F.2d 1364 (10th Cir. 1978).

with the Congress. The enactment of the McCarran Amendment was an exercise of political power not subject to control by the judicial branch. This long established rule was reiterated in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903):

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. *Id.* at 568.

The only duplicative litigation in New Mexico has resulted from the United States' and the Indians' tenacious efforts to avoid McCarran jurisdiction of any kind.[8]

4. The Jicarillas contend in point no. 4 that this case is ripe for review. We would concede this point but for the existence of the Court's decision in *Colorado River.* All of the issues presented in this case are there resolved fully and fairly.

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8. The United States has asserted that certain state proceedings do not fall within the embrace of McCarran [*Dugan v. Rank*, 372 U.S. 609 (1963)], that McCarran does not extend to adjudication of federal reserved rights, but only acquired rights [*United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971)], that if McCarran does embrace federal reserved rights they need not be quantified [*Avondale Irrigation Dist. v. North Idaho Properties*, 96 Idaho 1, 523 P.2d 818 (1974)], and that federal reserved rights for Indians are not covered by McCarran (*Colorado River, supra*). The protracted history of litigation based on the United States' unwillingness to accept McCarran jurisdiction is nothing short of remarkable.

5. The Jicarillas next argue that 28 U.S.C. § 1362 confers exclusive jurisdiction on federal courts over Indian-initiated lawsuits – that, in effect, the McCarran Amendment is accordingly repealed or limited by implication. A similar argument was made in *Colorado River* where it was asserted that Public Law 83-280 repealed or amended the McCarran Amendment. The Court's express rejection of this implied repealer argument is equally applicable here: ". . .There being no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment. . . ." (*Id.* at 812).

6. The Jicarillas contend that application of the McCarran Amendment as construed in *Colorado River* is injurious to Indians because of state court prejudice, contrary to "(t)he policy of leaving Indians free from state jurisdiction. . . ." (Petition, p. 23, citing *McClanahan v. Arizona Tax Commission*, 411 U.S. at 168).

The alleged pressure on state court judges to rule provincially on questions of federal reserved water rights has been argued twice before in this Court. Brief of Petitioner, p. 9, *United States v. District Court in and for Eagle County, supra; Colorado River, supra.* Actual practice in the adjudication of federal reserved rights indicates no appreciable difference between their treatment in state court and federal court. Compare the state district court decision in *Mimbres Valley Irrigation Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (1977), aff'd sub nom. *United States v. New Mexico*, ___U.S.___. 98 S. Ct. 3012 (1978), and the federal district court decision in *State of New Mexico ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America*, No. 9780-Civil, (U.S.D.C.N.M.), respecting federal reserved rights; the more lenient treatment is found in state court. This Court's recent decision in *United States v. New Mexico, supra,* also supports the view that federal and state court judges reason the same way.

The Jicarillas conclude their argument by urging that if the policy of leaving Indians free from state jurisdiction is to be changed, "it should be done so expressly by Congress." As the Tenth Circuit and this Court have held, however, Congress has done so by enacting the McCarran Amendment.[9]

7. The Jicarillas argue that the Tenth Circuit erred by failing to address the issue of "appropriateness of dismissal." A review of the Tenth Circuit's opinion disproves this contention. Both the district court and the Tenth Circuit considered that the state court adjudication was filed nine months before the federal action (Petition, App. 4a, 8a, 15a), that the state court adjudication involved a more comprehensive adjudication of the water rights in the San Juan River Basin, (Petition, App. 4a, 6a, 11a, 12a, and 15a), and that federal court adjudication of the Navajo River would generate piecemeal and incomplete litigation contrary to the policy considerations underlying the McCarran Amendment (Petition, App. 8a, 12a, 14a-16a, 30a, 33a-36a). There was ample consideration by both the district and circuit courts on the issue of appropriateness of dismissal.

The Jicarillas spend considerable time in arguing that the ulterior purpose of the state court adjudication was to bring the United States and its three Indian wards within state court jurisdiction. As was already pointed out in our Statement of the Case, such an assertion is a misrepresentation of the state court case wherein New Mexico has named 1600 defendants and intends to add 1400 more to fully adjudicate all of the interrelated surface and ground water rights to the use of public waters in the San Juan River Basin.

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9. As noted in footnote 6, *supra*, it was concluded in *Colorado River* that even though the McCarran Amendment did not expressly confer jurisdiction to adjudicate federal reserved rights on behalf of Indians such "(a)uthority to sue. . .is implied." *Id.* at 812, citing *Turner v. United States*, 248 U.S. 354 (1919).

POINT II: THE HOLDING IN *COLORADO RIVER* IS CORRECT AND SHOULD STAND UNDISTURBED.

In *Colorado River* the Court stated: "(B)earing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] Amendment excluding [Indian] rights from its coverage would enervate the Amendment's objective."[10] (*Id.* at 811). Reference was made to Senate Report No. 755:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or

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10. The ubiquity of federal reserved rights on behalf of Indians derives from the magnitude of Indian claims. For example, the claims of one tribe in New Mexico are approximately twice the natural supply, quite aside from the conflicting rights of the non-Indian claimants. Likewise, in the San Juan River system, which is tributary to the Colorado, New Mexico's share under the Upper Colorado River Basin Compact is 11¼% of the Upper Basin's share after the deduction of 50,000 acre-feet for Arizona; assuming a full supply, New Mexico is entitled to deplete 838,125 acre-feet annually. Pursuant to the compact, any rights ultimately adjudicated to New Mexico Indians will be accounted against New Mexico's share. However, the combined claims of the Navajos, the Ute Mountain Utes, and the Jicarilla Apaches, the three tribes involved in the San Juan adjudication in state court, will likely total in the millions of acre-feet.

Also, the Jicarilla Reservation is an executive order reservation with the most junior priority of the three tribes in the pending state court proceedings. It might be suggested that one of the primary reasons the Jicarillas are attempting to avoid the San Juan litigation is to prevent the entry of a comprehensive decree which would facilitate administration as against the Navajos and the Utes.

> action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. (424 U.S. at 812).

Perhaps the most fundamental principle common to all forms of statutory adjudication in the western states is the compulsory joinder of all ascertainable parties. Indeed, the absence of known claimants is jurisdictional. *Dugan v. Rank,* 372 U.S. 609 (1963); *Miller v. Jennings,* 243 F.2d 157 (5th Cir. 1957), *cert. den.* 355 U.S. 827 (1957). As stated by the New Mexico Supreme Court:

> Some court must have exclusive jurisdiction to render an all-embracing judgment. It seems unnecessary to enlarge upon this. Others have well stated it. 3 Kinney on Irrigation and Water Rights (2d Ed.) Section 1568; *Weiland v. Reorganized Catlin Consol. Canal Co.,* 61 Colo. 125, 156 P. 596; *Louden Canal Co. v. Handy Ditch Co.,* 22 Colo. 102, 43 P. 535; *Hazard v. Reservoir Co.,* 87 Colo. 364, 287 P. 854; *Owens v. Snider, et al.,* 52 Okl. 772, 153 P. 833; *Pacific Live Stock v. Lewis,* 241 U.S. 440, 36 S. Ct. 637, 60 L.Ed. 1084; *Snow v. Abalos,* 18 N.M. 681, 140 P. 1044; *Pueblo of Isleta v. Tondre,* (dissenting opinion) 18 N.M. 388, 137 P. 86. [*El Paso & R.I. Ry. Co. v. District Court of the Fifth Judicial District,* 36 N.M. 94, 8 P.2d 1064, 1067-68 (1931)].

Without the participation of all claimants it is impossible to determine the relative and conflicting interests to the use of water in a given stream system, thus defeating the administrative and regulatory purposes of water rights litigation. Without the joinder of all claimants it is also impossible for the individual states to protect all water users in the exercise of their rights, to secure a just distribution of public waters, and to perpetuate water rights in the public record.

Until 1952 it was not possible to thoroughly adjudicate the interrelated rights on a river system. The problem was noted in Senate Report No. 755, 82nd Cong. 1st Sess.: "If a water user. . . is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States. . . to effect honest, fair and equitable division of the public waters will be seriously jeopardized." (*Id.* at p. 5). Accordingly, the waiver of immunity embodied in the McCarran Amendment was a general waiver designed to reach all of the United States' claims to water. For obvious reasons, the Congress refused to amend S. 18 so that the waiver would "not extend to rights asserted by the United States for or on behalf of Indians," as requested by the Department of the Interior. (Sen. Rep. No. 755, p. 8). See, *Colorado River, supra,* pp. 809-812.

Of the seventeen western states which recognize and apply the doctrine of prior appropriation, nine have constitutional disclaimers identical or similar to New Mexico's: Arizona, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming. Appendix "A" shows graphically that one or more Indian reservations are located on most of the major streams in these states. If New Mexico and the other nine disclaimer states are precluded from adjudicating federal reserved rights on behalf of Indians in state court, they would be severely prejudiced and the Congressional intent underlying the McCarran Amendment clearly violated. The reverse is

not true, however. The Court has already determined that Indian water right claims are no more endangered in state court than in federal court:

> Moreover, the Government's argument [against state court jurisdiction] rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect Indians. Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law. (Citations omitted). The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. . . . 424 U.S. 812-813.

The McCarran Amendment is sound public law, providing the only means of ending the uncertainty that federal reserved rights pose for the millions of people in the West who depend upon water rights vested under state law. If it is to be changed the Congress should do so.

CONCLUSION

There is no substantive distinction between the *Colorado River* holding and the case at bar. Because *Colorado River* is

clear, fair and controlling, the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals should be denied.

Respectfully submitted,

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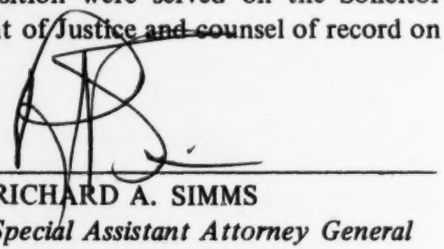
CERTIFICATE OF SERVICE

Pursuant to Rules 42(5) and 33 of the Supreme Court Rules, I certify that three copies of the foregoing Amicus Curiae Brief of New Mexico in Opposition were served on the Solicitor General of the Department of Justice and counsel of record on November 8, 1979.



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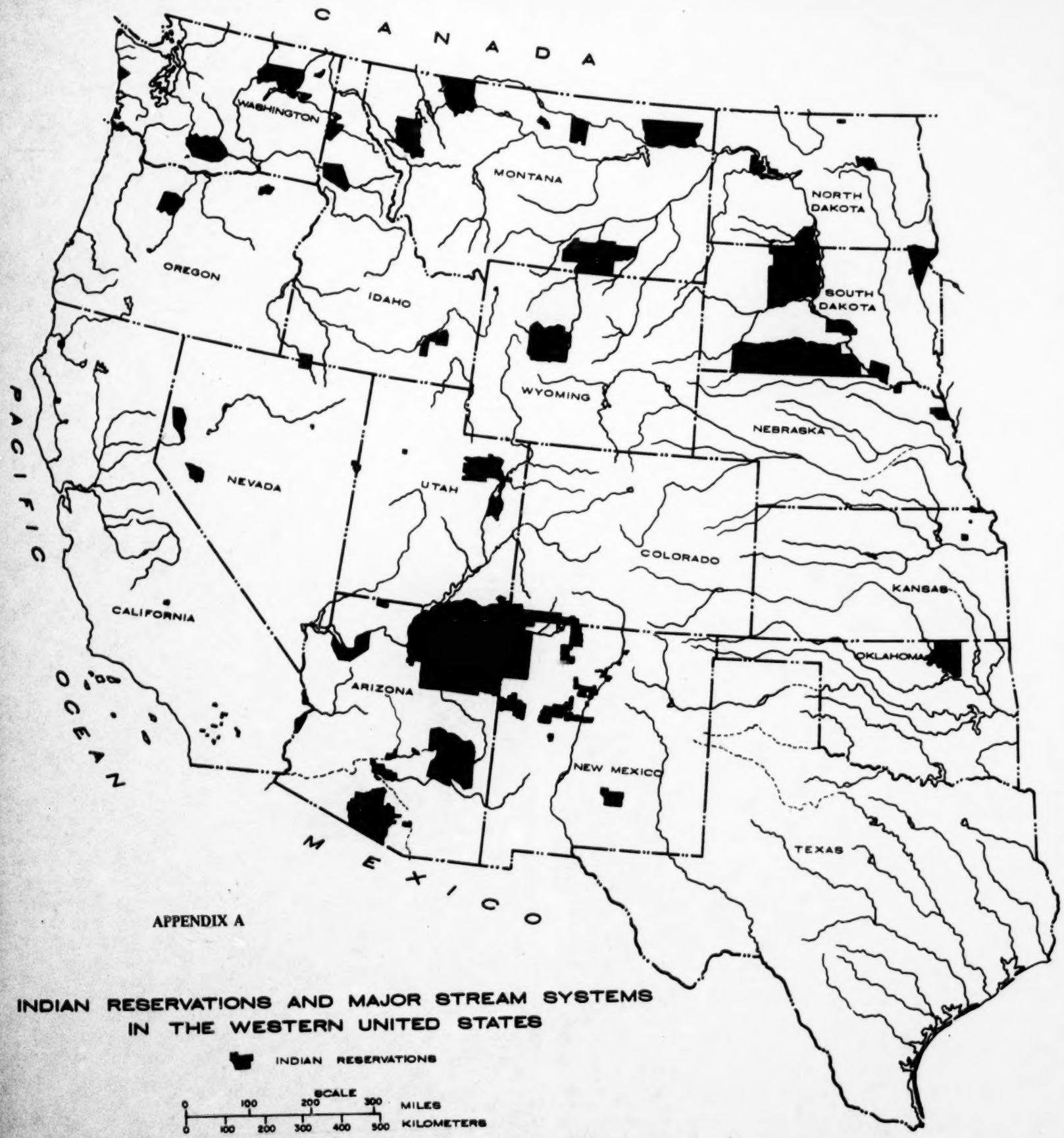

APPENDIX A

INDIAN RESERVATIONS AND MAJOR STREAM SYSTEMS IN THE WESTERN UNITED STATES

Prepared by New Mexico Water Resources Division from National Atlas, Federal Lands (sheet no. 272) compiled by U.S.G.S., 1968.

Supreme Court, U. S.
FILED
DEC 5 1979
MICHAEL RODAK, JR., CLERK

NO. 79-475

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AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON IN OPPOSITION

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AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON IN OPPOSITION

The State of Washington submits this amicus curiae brief in opposition to the petition for writ of certiorari

in this proceeding in relation to question (1) of the "questions presented" as set forth in 48 L.W. 3297 (October 30, 1979).

QUESTION PRESENTED

"Question presented" (1) provides:

> "Do provisions of New Mexico Enabling Act and New Mexico constitution, in which people of New Mexico agree and declare that lands held or owned by Indian tribes shall be remain and control under absolute jurisdiction of the U.S. Congress, preclude adjudication of water rights of Jicarilla Apache Tribe in New Mexico state court?"

Washington State's interest in this case is heightened because it's Constitution and related Enabling Act are almost exact counterparts to those of New Mexico. Further, the State is interested because it has been conducting, over the last two decades, an active state court general water rights adjudication program in state court

which applies to federal reserved rights including such rights held by or for the benefit of Indians.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS VERY RECENTLY HELD THAT FEDERAL STATUTES ALLOW FEDERAL INDIAN RESERVED WATER RIGHTS TO BE ADJUDICATED IN STATE COURT.

The first issue, whether the federal statute known as the "New Mexico Enabling Act" precludes the adjudication of federal Indian reserved rights, is solely a matter of federal statutory interpretation. Federal statutes relevant to resolving the issue, including the McCarran Amendment, 43 U.S.C. §666, were considered in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). In that 1976 decision, the Court, after very extensive briefing, including an express submission of the

federal Enabling Act contention presented again to the Court in this proceeding,[1] held that Congress had consented to have all federal reserved water rights, including reserved rights for Indians, adjudicated in state general water adjudications proceedings. See also United States v. District Court in and for Eagle County, 401 U.S. 520 (1971).

II. WHETHER A STATE'S CONSTITUTION PRECLUDES THE GENERAL ADJUDICATION OF FEDERAL INDIAN RESERVED RIGHTS IN A STATE COURT DOES NOT PROVIDE AN APPROPRIATE BASIS FOR ISSUING THE REQUESTED WRIT.

The second issue involves a matter of state constitutional interpretation. The meaning of a state constitutional provision is a primary responsibility

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1/ See Amicus Curiae Brief of Southern Ute Indian Tribe (and 14 tribes or other Indian organizations), filed in Colorado River Water Conservation District, at pp.6 and 23-26.

of the state's courts. This Court does not normally venture into that arena. See Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974).

Further we note that the Washington State Supreme Court, in patterns analgous to the state constitututional issues raised in this proceeding, has provided constitutional interpretation roadsigns stating that the "disclaimer" and "absolute jurisdiction" wording of Washington's constitution (Art. XXVI, sec. 2) does not preclude adjudication of reserved water rights benefitting Indians in Washington State courts. See State v. Paul, 53 Wn. 2d 789, 794, 337 P.2d 33 (1960); Makah Indian Tribe v. State, 76 Wn.2d 485, 456 P.2d 590 (1969); and The Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), cert. den. 387 U.S. 907. See also, Washington v. Yakima

Indian Nation, 439 U.S. 463 (1979).

III. FOR FIFTEEN YEARS FEDERAL RESERVED RIGHTS, BOTH NON-INDIAN AND INDIAN, HAVE BEEN ADJUDICATED IN WASHINGTON STATE COURTS.

After many years of dormancy, in 1964, the State of Washington initiated a general adjudication program. Since that time federal reserved rights have been subject to state adjudication in eleven state court general adjudications with the Department of Justice representing the United States or an Indian as claimant. On two of these occasions the reserved rights involved were Indian reserved rights. In In re Chiliwist Creek, No. 16323 (Super. Ct. of State of Wash., Okanogan County, Judgment entered May 16, 1967) 2/

2/ This case was appealed by a party other than the United States to consider issues not relevant here, In re Chiliwist Creek, 77 Wn.2d 658 (1970).

the United States did not appeal either the state superior (trial) court's determination of jurisdiction to adjudicate the Indian reserved right or the scope, nature and priority of the right. In In re Bonaparte Creek, No. 17,787 (Super. Ct. of State of Wash., Yakima County, filed 1965), involving an Indian claiming a reserved right in a state general adjudication and represented by the Department of Justice, the Department of Justice has neither attempted to remove nor challenge the jurisdiction of the state court to adjudicate an Indian reserved right of an Indian allottee.3/

3/ A final decree of the trial court is set for entry on December 7, 1979 in In re Bonaparte Creek, supra. Therefore, we cannot state with certainty that a jurisdictional challenge to the state court through appeal, by the Department of Justice, will not be initiated. We can only say we have never been advised at any stage

It is relevant to a decision on the pending petition, in terms of historical as well as contemporary understanding, that the State of Washington has been adjudicating federal reserved rights, Indian and non-Indian, in relative harmony with the Department of Justice and the Indian parties long before Eagle and Colorado River Water Conservatory District, supra, were decided. See generally Oliphant v. Suquamish Tribe,

3/ (continued)
of the proceedings that the jurisdictional issue might be raised by appeal.

There is a third case probably involving Indian reserved rights. In State of Washington v. Acquavella, No. 77-2-0148405 (Super. Ct. of State of Wash., filed October 25, 1977), a state court adjudication of the Yakima River system, the court has not reached a stage to know exactly what reserved rights, non-Indian or Indian, will be claimed. This case was removed to federal court and subsequently remanded by that court, at the request of the State of Washington, to state court.

435 U.S. 191 (1978). On some occasions during the past fifteen years, the actions of non-appeal by the Department of Justice lead to the conclusion that, at least in Washington State, state courts sometimes (in the eyes of the Department) have jurisdiction to adjudicate federal (Indian) reserved rights.

CONCLUSION

In relation to the issues pertaining to "question presented" (1), we urge the petition should be denied. We express no views on the other issues raised.

Respectfully submitted,

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December 1979